United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

160 P

BRIEF OF APPELLANT BLAIR

AND APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,033

CLARENCE BLAIR, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

F 007

No. 21,034

JAMES L. SUGGS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HILLEL ABRAMS
8720 Georgia Avenue
Silver Spring, Md.

Attorney for Appellant
Clarence Blair
Appointed by this Court

QUESTIONS PRESENTED

The questions are: (1) were the comments made by the trial judge, criticising the demeanor of the defendants and their attorneys and implying professional misconduct on the part of the attorneys, coupled with the intervention of the court in the proceedings favorably for the Government, sufficient to create an atmosphere wherein the defendants could not receive effective assistance of counsel and a fair trial; and, (2) whether the trial judge should have instructed the jury, as part of his instruction on "aiding and abetting", where the prosecutor made an issue thereof on cross-examination, that mere negative acquiescence or the failure of defendant to resist or prevent a crime does not constitute "aiding and abetting".

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT CLARENCE BLAIR

JURISDICTIONAL STATEMENT.

This is an appeal by the Appellant Clarence Blair from an Order entered on the 4th day of May, 1967, by the United States District Court for the District of Columbia, adjudging Appellant Clarence Blair guilty of Robbery, and imposing a sentence of five to fifteen years.

This Court has jurisdiction of this appeal under Title 28, Section 1291, of the United States Code.

STATEMENT OF THE CASE

On March 23, 1966, at approximately 6:00 P.M., shortly after closing hours, the Lord & Taylor Department Store on Western Avenue N.W., in the District of Columbia, was robbed by a group of men who forced the last three departing employees to reopen the doors to the store and then the safe. After the robbers left, a report was made to the police and a lookout was broadcasted for the robbers and their red Thunderbird. The car was spotted by a number of motorized policemen and a chase began. The red Thunderbird finally came to a stop at 5th and Hamilton Streets N.W., and four men jumped out. Two of the men fled into the north alley and two into the south alley. Appellant Blair was apprehended in the north alley and Suggs was apprehended in the south alley.

[redacted]

testified that on the day in question, after he got off from work, and while proceeding on foot along Wisconsin Avenue, N.W., heading home, he was given a ride by three men in a red Thunderbird. He was acquainted with one of the passengers in the car. (Tr. 464-465, 862) As the car approached Western Avenue N.W., without prior notice or warning to Blair, the driver turned the car left into a side road leading into the parking lot of Lord & Taylor, and stopped the car in close proximity of the employees' entrance. Blair protested, to no avail. (Tr. 465-466, 363-864) As the last three employees to leave closed and locked the doors to the store and proceeded to their parked cars, the three original occupants of the red Thunderbird jumped out of their car, with pistols in their hands, and forced the store employees to return to the store. (Tr. 466-467)

Blair, not being a party to the plot, left the car and its occupants and proceeded to walk to and then on Western Avenue towards Wisconsin Avenue and his original destination of home (Tr. 467).

Shortly thereafter, as he was walking towards Wisconsin Avenue, the red Thunderbird reappeared and the original three occupants, with guns in their hands, ordered Blair to get into the car, which he did (Tr. 468-469, 869, 871). After the chase that followed, when the car came to a stop on the 400 block of Hamilton Street N.W., he left the car and ran into the north alley, where he was apprehended by the police (Tr. 471). He had no weapon on him, nor was any weapon found near him when apprehended (Tr. 238-239, 243-244, 892).

[redacted]. They were tried together before a jury which returned a verdict of guilty against Blair on the first count of robbery, and not guilty as to the remaining counts.

During the course of the trial, the trial judge made a number of comments to the defendants and their counsel, criticising their conduct and demeanor, restricting their active participation in the defense of the case, and implying professional misconduct on the part of their counsel. The trial judge ordered Blair to sit and listen to the testimony and not display any disappointment, or "anything like that", on pain of going to jail for the duration of the trial (Tr. 111); criticised his attorney for abiding by his client's wishes and not reporting that his client was beaten by the police after arrest, and threatened to report the matter to the Grievance Committee for disciplinary action (Tr. 487-488); and chastised co-counsel for Suggs (Mr. Roberson) and the defendants for looking at the court "that way" (Tr. 111) or "like that" (Tr. 479, 481), and for not sitting up straight at the counsel table, and for discussing the case with others at the table (Tr. 111-113, 479-480). Attached (as Appendix A) are affidavits of counsel for defendants in the trial below, evidencing the effect upon them of the statements made by the trial judge and of his conduct throughout the proceedings.

On other occasions, the judge interrupted the proceedings to (1) cross-examine a witness for Blair, out of the presence of the jury, and brand him a liar, whom the court "would not believe...on a stack of Bibles", and thereafter allowed the Assistant U. S. Attorney to proceed and cross-examine the witness again, in the presence of the jury, concerning the same matters (Tr. 452-460), and (2) suggest that Blair, who had concluded and rested his case, be questioned further regarding prior convictions (Tr. 886-889), and, immediately thereafter, instructed the jury, out of order and at length, regarding admission of prior convictions as relating to the credibility of the defendant (Tr. 889-892).

At the conclusion of the evidence, the trial judge instructed the jury concerning the applicable law; however, while instructing the jury at length concerning "aiding and abetting", [redacted] standing the cross- [redacted] d [redacted] e [redacted] Tr. 1291-1293).

STATEMENT OF POINTS

(I) [redacted].

(II) The remarks made by the trial judge to counsel for the appellants created an atmosphere of tension and deprived the appellants of effective assistance of counsel and a fair trial.

(III) The undue interference of the trial judge in the proceedings denied the appellants a fair trial.

(IV) [redacted] ce, [redacted] and abetting".

SUMMARY OF ARGUMENT

During the course of the trial, the trial judge severely reprimanded the defendants and their counsel for their demeanor (facial expressions of disapproval at damaging testimony, the way counsel sat and conferred at the trial table, and the way counsel and defendants looked at the judge), and threatened to incarcerate the defendants for the duration of the trial, and to expel co-counsel from the proceedings. A most serious threat was made to defense counsel when the trial judge implied professional misconduct on his part and threatened him with disciplinary action before the Grievance Committee for honoring his client's wishes and not reporting police brutality when it occurred. The court further unnecessarily intervened in the proceedings favorably to the Government, and failed to instruct the jury on applicable law as relating to the facts presented by appellant Blair.

[redacted]

ARGUMENT

I. THE TRIAL JUDGE, BY HIS CRITICISM OF THE APPELLANT, PREVENTED HIM FROM PARTICIPATING IN THE PROCEEDINGS AND THUS DEPRIVED HIM OF A FAIR TRIAL.
(with respect to this point, appellant desires the Court to read: Tr. 111, 112, 113)

At common law and under the Constitution, an accused charged with a felony is entitled to be present at every stage in the trial, Evans v. United States, 284 F. 2d 393 (6th Cir. 1960), 94 A.L.R. 2d 266; United States v. Neal, 320 F. 2d 533 (3d Cir. 1963); Root v. Cunningham, 344 F. 2d 1 (4th Cir. 1965), cert. denied, 382 U.S. 366, 86 S. Ct. 135, 15 L. Ed. 2d 104, so as to render assistance to his counsel. Thus, mere physical presence is not sufficient. He must

also be mentally present, and be allowed to take an active part in the proceedings, "for how can he make his defense" otherwise? Ashley v. Pescor, 147 F. 2d 313 (3th Cir. 1945), quoting from 4 Bl. Comm. 24.

It is not uncommon for the jury to watch the accused at the counsel table, throughout the trial, and particularly for his reaction to unfavorable testimony. His failure to respond to damaging testimony could well imply admission, consent or complete lack of interest, all of which would damage his case and favor in the eyes of the jury, who, in the final analysis, must judge him by what they see and hear.

In order that the accused may actively participate in his trial, he must therefore be allowed to confer with his attorney, and so long as he does not vocally disturb the proceedings, he must also be allowed to express disapproval or disagreement by facial expression or by moving his head in the negative when a witness for the Government testifies contrary to that which he believes to be the truth.

On the first day of the trial, and while one of the witnesses for the Government was testifying that she saw the defendant Blair in the vicinity of Lord and Taylor's a few days before the robbery, the trial judge stopped the testimony, and excused the jury to reprimand the defendant Blair on his silent expression of disapproval (Tr. 111):

> "THE COURT: Stand up, Mr. Blair. (Defendant Blair stands.)
>
> "I watched you since the beginning of this trial. I just noticed you moving your head in the negative when this lady identified you. Now from now on you listen to the witnesses but don't you display any disappointment or anything like that, do you understand that?
>
> "DEFENDANT BLAIR: Yes, sir.
>
> "THE COURT: Or I'll commit you for the rest of the trial, is that clear?
>
> "DEFENDANT BLAIR: Yes, sir."

The admonition was then extended to both defendants Blair and Suggs, and they were further directed not to look at the judge "that way" (Tr. 111).

The explanation of Mr. Roberson, associate counsel for defendant Suggs, that the defendant was moving his head in response to a question directed to him by Roberson, was of no avail (Tr. 112-113).

As a result, the defendant was placed in a most untenable position. He could have challenged the court's directive and insisted on his right to be present and participating in the proceedings, or submit and hope for the best.

It is naive to believe that an innocent person, possessed of all his faculties, would sit silently and motionless while damaging testimony, which he believes to be false, is being given against him by a witness. The jury knows that; and it, like the judge, must have been watching the defendant for his reactions.

The jury could not, if they would, shut their eyes to what is transpiring around them; and it is always proper for them to consider the conduct, deportment and demeanor of the accused while on the stand and in court. State v. Hutchinson, 95 Iowa 566, 64 N.W. 610 (1895). Just as the expressions of the accused become part of his case, so is his lack of expression part of his testimony.

[redacted]

II. THE REMARKS MADE BY THE TRIAL JUDGE TO COUNSEL FOR THE APPELLANTS CREATED AN ATMOSPHERE OF TENSION, AND DEPRIVED THE APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIAL.

(with respect to this point, appellant desires the Court to read: Tr. 475-489, 492-493, 828-829)

Equal to his right to be present and participate in the proceedings, the accused has a right to counsel of his own choice. Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942); McKinney v. United States, 93 U.S. App. D.C. 222, 208 F. 2d 844 (1953).

The right of the accused to counsel is a "fundamental" and "substantial" one, and is not satisfied by mere token or formal representation. Gadsden v. United States, 96 U.S. App. D.C. 162, 223 F. 2d 627 (1955); McGuire v. United States, 289 F. 2d 405 (9th Cir. 1961).

It has therefore been held, and is well recognized in this jurisdiction, that the right to counsel means the right to "effective assistance of counsel." Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), 84 A.L.R. 527; Mitchel v. United States, 104 U.S. App. D.C. 57, 259 F. 2d 787 (1958), cert. denied, 358 U.S. 850, 79 S. Ct. 81, 3 L. Ed. 2d 86.

Counsel must not only be competent, but must also have adequate opportunity to prepare for the assigned task (Gadsden v. United States, supra), and must have no divergent interests (Mitchel v. United States, supra). The accused is entitled to the undivided assistance of counsel of his own choice (McGuire v. United States, supra).

Any interference with the effectiveness of counsel, be that by means of undue criticism of defense counsel or undue intervention and disruption of the proceedings has variously been held prejudicial to the accused, for it may very well tend to "unnerve" counsel and "throw him off balance so that he could not devote his best

talents to the defense of his client." United States v. Kelley, 314 F. 2d 461, 463 (6th Cir. 1963); Young v. United States, 120 U. S. App. D.C. 312, 346 F. 2d 793 (1965).

> "It is an important rule that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from the court that the interests of his client may not be prejudiced. That is not a matter of indulgence, but of right." Grock v. United States, 53 App. D.C. 146, 289 F. 544 (1923).

The abuse of counsel by the trial judge is not a matter of discretionary procedural deviation, but rather a "substantial infringement of a right." 62 A.L.R. 2d 166, 171.

In the Young case (supra), the trial judge criticised defense counsel for seeking assurance that every Jencks Act statement had been produced. This Court, reviewing the conduct of the lower court, said that the unwarranted criticism and the continuous intervention of the trial court in the proceedings may well have prejudiced the defendants, notwithstanding the strong evidence against them. And, even if no prejudice to the defendants were apparent, the interests of public justice require that a trial be conducted by one who is a disinterested and objective participant in the proceedings.

In the present proceedings, on the third day of the trial, counsel for defendant Blair attempted to obtain a ruling from the trial judge as to the admissibility of testimony concerning police brutality on the part of certain officers who testified for the Government in its case-in-chief, for the purpose of showing bias and prejudice. (Tr. 475 et seq)

After a brief argument and proffer made by defendant Blair, the trial judge severely reprimanded counsel for defendants for not reporting the incident of police brutality when it first came to

their attention. Counsel for Blair protested that he was instructed not to report the matter, and the following colloquy took place (Tr. 437-438):

> "THE COURT: Don't you think that as an officer of this Court, and under your oath as a lawyer, that you had a duty to do something about this matter, if that had occurred, Mr. Anderson?
>
> "MR. ANDERSON: No, Your Honor.
>
> "THE COURT: I am thinking seriously of referring this case to the Grievance Committee. I will look into the matter.
>
> "All right, I think that's information that you as a lawyer and a member of this Bar should have divulged to the proper authorities at that time.
>
> "MR. ANDERSON: Your Honor, I talked to the mother of the defendant--
>
> "THE COURT: I don't care who you talked to, the mother or anyone else. You owe a duty to this client of yours to divulge any brutality that existed. And that raises a doubt in my mind that it ever existed. If it had been my client somebody would have heard about it.
>
> "MR. ANDERSON: Your Honor, I am still guided by my client's wishes."

There is no greater threat to a practicing attorney than the threat of punitive action taken before the Grievance Committee. Without his license, his livelihood is gone. To expect counsel for Defendants to devote their undivided interest, zeal and best talents to the defense of their clients, while their own professional well being is threatened, is to indulge in wishful thinking. Thereafter, counsel will be constantly and overcautiously on guard not to upset the trial judge in hopes that the incident might be forgotten and overlooked by the court.

"Effective representation of counsel", by necessity, implies the "undivided assistance of counsel of his own choice." Glasser v. United States, supra. Counsel, generally, is selected for his respected vigor, zeal and experience in the subject matter litigated, and the client is entitled to the full and undivided effort and

skill of his counsel to the fullest extent of his ability. Blair and Suggs selected their counsel to represent them in these proceedings, and as such, their choice should have been respected and they should have been entitled to the maximum effort and full time and attention of counsel of their choice. Such undivided attention and assistance require that there be no "conflict of interest" or "the additional burden of representing another party". Glasser v. United States, supra.

[redacted]

To determine the precise degree of prejudice sustained by defendants as a result of the criticism and threat leveled against counsel for the appellants, is at once both difficult and unnecessary.

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, supra.

Aside from the conflict of interest issue presented, there can be no question that such a threat unnerved defense counsel and threw them off balance, and that the end result was that they could not devote their best interests to the defense of their clients, all to the prejudice of the appellants. See counsels' affidavits attached as Appendix A.

The prejudice suffered is further apparent from the proceedings that followed.

After the criticism and threats aforesaid, the trial judge summarily ordered inadmissible any testimony of bias and prejudice (Tr. 488), denied counsel for defendant Suggs a hearing on the matter, and recessed for the day (Tr. 489).

The following day, without prior warning to the defendants, the trial judge advised the parties that he changed his mind, and requested that further proffer be made of evidence regarding police brutality (Tr. 492). This caught the defense off guard. All that Mr. Anderson could do was ask his client (Blair) to confirm that he (Anderson) was formerly asked not to report the police brutality. No further proffer of evidence of police brutality was made on behalf of Blair (Tr. 492-493). It is obvious that counsel for Blair was preoccupied with the threat of Grievance Committee action and was totally unprepared for the task at hand (Tr. 493).

The subject of police brutality and the refusal of the court to allow testimony concerning same, is treated at greater length in the brief of appellant Suggs, and, for the purpose of brevity, is hereby adopted by reference for the appellant Blair. Suffice it to say that counsel for appellant Blair did not pursue the matter "effectively" within the meaning of Mitchel v. United States, supra, and of United States v. Poe, 122 U. S. App. D.C. 163, 352 F. 2d 639 (1963).

[redacted]

e Glasser v. United States, supra.

The effect of the criticism was equally felt by counsel for Suggs (see Appendix A attached), who was, in addition, subjected to criticism of her associate counsel (Mr. Roberson) for not sitting up straight at the counsel table and for looking at the judge ("like that") in a manner which seemed to displease the court (Tr. 479). When Mr. Roberson protested that he was discussing the case, the judge retorted: "I don't care whether you are discussing the case, or not. If you don't like the way I try cases, please leave the courtroom. You're not any better than anyone else in this courtroom. You're just another lawyer." (Tr. 479-480) Mr. Roberson was then admonished not to "answer me back".

Shortly thereafter the judge again took offense at the way Mr. Roberson seemed to be looking at him, and, for the second time, ordered Roberson out of the courtroom. When Mrs. Roundtree interceded on behalf of her associate, the judge commented: "This is the way this whole thing of police brutality is being brought into this case." (Tr. 481)

It is respectfully submitted that the criticism and threats levelled at counsel for the defendants in these proceedings were much graver, serious and more damaging that that found in the Young case, supra, and that the tension and pressure thus created effected them all and deprived the appellants of a fair trial.

III. THE UNDUE INTERVENTION OF THE TRIAL JUDGE IN THE PROCEEDINGS DENIED THE APPELLANT A FAIR TRIAL.

(with respect to this point, appellant desires the court to read: Tr. 452-460, 887-892, 1026-1027, 1036-1038)

The instances discussed above were not the only intervention by the trial judge in the proceedings. On the third day of the trial, after the prosecuting attorney finished his cross-examination of a witness for the defendant Blair, the trial judge, out of the presence of the jury, cross-examined the witness at length (Tr.

452-456-b). At the conclusion of his cross-examination, the judge stated that the witness was "lying" and that he, the judge, "would not believe a word he said on a stack of Bibles" (Tr. 456-b). The jury was then called back, and the witness subjected to a repeated cross-examination by the prosecuting attorney, who covered the material covered before (Tr. 457-460) [redacted]

On another occasion, on the fifth day of the trial, at the conclusion of the examination of defendant Blair, after the Government and the defense for Blair had rested their cases, [redacted] (Tr. 387). At the conclusion of the new cross-examination, the trial judge proceeded to instruct the jury at length on the effect of an admission of prior convictions on the testimony of the defendant (Tr. 389-392). A similar instruction was given at the conclusion of all the testimony on the seventh day of the trial (Tr. 1303).

It is obvious that the jury did not believe Blair; otherwise he would have been found not guilty of all the charges brought against him. To what extent the intervention of the trial judge in the proceedings effected the outcome of the case, is obviously impossible to determine. Suffice it to say that:

> "...even if no prejudice to the defendants were apparent, the interests of public justice require a trial conducted by one who is a 'disinterested and objective participant in the proceeding'." Young v. United States, supra, at page 796, quoting from Billeci v. United States, 87 U.S. App. D.C. 274, 283, 184 F. 2d 394, 403 (1950), 24 A.L.R. 2d 831.

The interrogation of witnesses should be left to counsel. Jackson v. United States, 117 U. S. App. D.C. 325, 329 F. 2d 893 (1964).

IV. THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT FAILURE TO RESIST OR PREVENT A CRIME, AND MERE NEGATIVE ACQUIESCENCE, DOES NOT CONSTITUTE "AIDING AND ABETTING".
(with regard to this point, appellant desires the court to read: Tr. 464-468, 864, 865, 868, 871-874, 1291-1298)

At the conclusion of the case, the judge instructed the jury, inter alia, on the law concerning "aiding and abetting", and gave the jury a number of examples to explain the principal involved (Tr. 1291-1298). The appellant does not challenge the correctness of the instruction on the law of "aiding and abetting", nor the examples, as given. [redacted] United States v. Williams, 341 U.S. 58, 71 S. Ct. 595 (1951), 95 L. Ed. 747. Similarily, mere negative acquiescence is not sufficient. Johnson v. United States, 195 F. 2d 673 (8th Cir. 1952); United States v. Dellaro, 99 F. 2d 781 (2d Cir. 1938).

Blair testified that he had sufficient reason to believe that a criminal act was going to be perpetrated by the driver and the other passengers of the vehicle in which he was a passenger (Tr. 466, 865), but steadfastly contended that he was neither a party to the scheme nor a participant (Tr. 464-468, 871-872). In fact, he protested the deviation from his appointed destination (Tr. 466, 864).

The example given by the court (Tr. 1297) of a salesman that happened to knock on the front door when a crime was being committed in the premises, surely has no relevance to the facts of the case.

The instruction suggested herein would have been especially appropriate in light of the cross-examination and suggestion made by the prosecuting attorney that Blair did nothing to prevent the crime unfolding before him (Tr. 868), or thwart the attempted flight that followed (Tr. 873-874). [redacted]

We find no law which requires a private citizen to resist the commission of a crime of which he has knowledge, or attempt to prevent the escape of the criminals.

Having allowed the questions on cross-examination, the trial judge should have instructed the jury that should they believe Blair that he actually had no part in the planning or execution of the crime, but merely chanced to be in the same car with the criminals and see a crime being committed (in its inception), he is not to be considered as an aider and abetter.

It is therefore submitted that the jury was mislead by the example given and therefore found Blair guilty of aiding and abetting in the robbery, whereas he was found not guilty of the remaining charges.

Counsel is mindful that no objection was registered by the trial attorney for Blair (Mr. Anderson) at the conclusion of the charge, as is required by Rule 30 of the Federal Rules of Criminal Procedure. It is submitted, however, that his failure to object and offer an additional charge to correct the inadequacy, is but

one example of the ineffectiveness of the representation which Blair was caused to receive following the criticism and threat made by the trial judge and directed at defense counsel.

In this connection, appellant requests the Court to consider the error under Rule 52(b) of said Rules.

CONCLUSION

For the reasons assigned, it is urged that the judgment of conviction against Blair be reversed.

Respectfully submitted,

HILLEL ABRAMS
Attorney for Appellant Blair
Appointed by this Court.

A P P E N D I X A

DISTRICT OF COLUMBIA ss:

Floyd W. Anderson being first duly sworn deposes and says that he was counsel of record for the defendant Clarence Blair at the trial level in United States v. Clarence Blair criminal number 573-66, that the attitude of the trial judge toward the case and toward counsel and more particularly the threat of grievance committee action against counsel, had a direct affect on counsel's representation of the defendant Clarence Blair

Floyd W. Anderson

Subscribed and sworn to by me this 16th day of November, 1967

Notary Public

My Commission Expires May 31, 1969

UNITED STATES COURT OF APPEALS

*

UNITED STATES *

vs

JAMES LEE SUGGS *

A F F I D A V I T

DISTRICT OF COLUMBIA, ss:

I, Dovey J. Roundtree, being duly sworn upon oath deposes and say as follows:

1. That I am a member of this bar in good standing.

2. That I represented James Lee Suggs in the Court below.

3. That as trial counsel for defendant Suggs, I honestly believe pressure and tension was brought to bear upon me by the Trial Court. My co-counsel was castigated, ordered from the Court Room because the Court did not like the expression on his face. Alan V. Roberson was my co-

counsel. That I begged the Court to re-consider its ban of my co-counsel but even when this request was granted, I feared the Court's ire thereafter.

4. That counsel for the defendant Blair was threatened with punitive sanctions- Grievance Committee procedure- at one point during the trial, and I felt this too, was directed to me.

5. That throughout the trial I was uneasy, fearful to the point that I felt that I was on trial, this continued up through the sentencing of Suggs.

Dovey J. Roundtree
DOVEY J. ROUNDTREE

SUBSCRIBED and SWORN to before me this 25th day of November, 1967.

Anne W. Palmer
NOTARY PUBLIC, D. C.

Brief of Appellant Blair

And Appendix

No. 21,033

CLARENCE BLAIR, APPELLANT,

v

UNITED STATES OF AMERICA, APPELLEE

(APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA)

PETITION FOR REHEARING EN BANC

Clarence Blair
Appellant-Pro-se
Box 25,
Dorton, Virginia 24077

QUESTION INVOLVED

The questions are: (1) were the comments made by the trial judge, criticising the demeanor of the defendants and their attorneys and implying professional misconduct on the part of the attorneys, coupled with the intervention of the court in the proceedings favorably for the Government, sufficient to create an atmosphere wherein the defendants could not receive effective assistance of counsel and a fair trial; and (2) whether the trial judge should have instructed the jury, as part of his instruction on "aiding and abetting", where the prosecutor made an issue thereof on cross-examination, that mere negative acquiescence or the failure of defendant to resist or prevent a crime does not constitute "aiding and abetting".

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

21, 033

Clarence Blair, Appellant

v

United States of America, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

CLARENCE BLAIR

JURISDICTIONAL STATEMENT

This is an appeal by the Appellant Clarence Blair from an Order entered on the 4th day of May, 1967, by the United States District Court for the District of Columbia, adjudging Appellant Clarence Blair guilty of Robbery, and imposing a sentence of five to fifteen years. A three judge division of this court affirmed the judgment of the court below in an Per Curiam Order.

This Court has jurisdiction of this Petition for Re-hearing In-Banc pursuant to Title 28, Section 1291 of the United States Code.

STATEMENT OF FACTS

On March 23, 1966, at approximately 6:00 P.M., shortly after closing hours, the Lord & Taylor Department Store on Western Avenue N. W. in the District of Columbia, was robbed by a group of men who forced the last three departing employees to reopen the doors to the store and then the safe. After the robbers left, a report was made to the police and a lookout was broadcasted for the robbers and their red Thunderbird. The car was spotted by a number of motorized policemen and a chase began. The red Thunderbird finally came to a stop at 5th and Hamilton Streets N. W., and four men jumped out. Two of the men fled into the north alley and two the south alley. Appellant Blair was apprehended in the north alley.

Blair admitted being in the red Thunderbird, but steadfastly maintained throughout his interrogation by the police and while testifying in court, that he took no part in the robbery. He also testified that on the day in question, after he got off from work, and while proceeding on foot along Wisconsin Avenue N. W., heading home, he was given a ride by three men in a red Thunderbird. He was acquainted with one of the passengers in the car. (Tr. 464-465, 662) As the car approached Western Avenue N. W., without prior notice or warning to Blair, the driver turned the car left into the side road leading into the parking lot of Lord & Taylor, and stopped the car in close proximity of the employees' entrance. Blair protested, to no avail. (Tr. 465-466, 663-664) As the last three employees to leave closed and locked the doors to the store and proceeded to their parked cars, the three original occupants of the red Thunderbird jumped out of their car, with pistols in their hands, and forced the store employees to return to the store. (Tr. 466-467)

Blair, not being a party to the plot, left the car and its occupants and proceeded to walk to and then on Western Avenue toward Wisconsin Avenue and his ordinal destination of home (Tr.467).

Shortly thereafter, as he was walking towards Wisconsin Avenue, the red Thunderbird reappeared and the original occupants, with guns in their hands, ordered Blair to get into the car, which he did (Tr. 468-469, 869, 871). After the chase that followed, when the car came to a stop on the 400 block of Hamilton Street N. W., he left the car and ran into the north alley, where he was apprehended by the police (Tr. 471). He had no weapon on him, nor was any weapon found near him when apprehended. (Tr. 238-239, 243-244, 392).

Blair and co-defendant Suggs were indicted in five counts each. The first count was for robbery. The next three counts were on assault with a deadly weapon, and the last count on possession of a deadly weapon without a license. They were tried together before a jury which returned a verdict of guilty against Blair on the first count of robbery, and not guilty as to the remaining counts.

During the course of the trial, the trial judge made a number of comments to the defendants and their counsel, criticising their conduct and demeanor, restricting their active participation in the defense of the case, and implying professional misconduct on the part of their counsel. The trial judge ordered Blair to sit and listen to the testimony and not display any disappointment or "anything like that", on pain going to jail for the duration of the trial Tr. 111); criticised his attorney for abiding by his client's wishes and not reporting that his client was beaten by the police after arrest, and threatened to report the matter to the Grievance Committee for disciplinary action (Tr. 437-438); and chastised co-counsel for Suggs (Mr. Roberson) and the defendants for looking at the court "that way" (Tr. 111) or "like that" (Tr. 479, 481), and for not sitting up straight at the counsel table, and for discussing the case with others at the table (Tr. 111-113, 479-480). Attached (as Appendix A) are affidavits of counsel for defendants in the trial below, evidencing the effect upon them of the statements made by the trial judge and of his conduct throughout the proceedings.

On other occasions, the judge interrupted the proceedings to (1) cross-examine a witness for Blair, out of the presence of the jury, and brand him a liar, when the court would not believe...on a stack of Bibles", and thereafter allowed the Assistant U. S. Attorney to proceed and cross examine the witness again, in the presence of the jury, concerning the same matters (Tr. 452-460), and (2) suggest that Blair, who had concluded and rested his case, be questioned further regarding prior convictions (Tr. 886-889), and, immediately thereafter, instructed the jury, out of order and at length, regarding admission of prior convictions as relating to the credibility of the defendant (Tr. 889-892).

At the conclusion of the evidence, the trial judge instructed the jury concerning the applicable law; however, while instructing the jury at length concerning "aiding and abetting", and notwithstanding the cross-examination of Blair concerning his inaction and seeming negative acquiescence to the crime (Tr. 868, 873-874), the court did not instruct the jury concerning the failure of Blair to take action to prevent the crime from being committed and resist the escape (Tr. 1291-1298).

STATEMENT OF POINTS

(1) The trial judge, by his criticism of the appellant, prevented him from participating in the proceedings and thus deprived him of a fair trial.

(2) The remarks made by the trial judge to counsel for the appellants created an atmosphere of tension and deprived the appellants of effective assistance of counsel and a fair trial.

(3) The undue interference of the trial judge in the proceedings denied the appellants of a fair trial.

(4) The trial judge erred in failing to instruct the jury that failure to resist or prevent a crime, or mere negative acquiescence, do not constitute "aiding and abetting".

SUMMARY OF ARGUMENT

During the course of the trial, the trial judge severly reprimanded the defendants and their counsel for their demanor (facial expressions of disapproval at damaging testimony, the way counsel sat and conferred at the trial table, and the way counsel and defendants looked at the judge), and threatened to incarcerate the defendants for the duration of the trial, and to expel co-counsel form the proceedings. A most serious threat was made to defense counsel when the trial judge implied professional misconduct on his part and threatened him with disciliinary action before the Grievance Committee for honoring his clients wishes and not reporting police brutality when it occurred. The court further unecessarily inter-vened in the proceedings favorably to the Government, and failed to instruct the jury on applicable law as relating to the facts presented by appellant Blair.

Appellant contends that for the reasons assigned, he was deprived of effective assistance of counsel of his choice and of a fair trial.

ARGUMENT

1. THE TRIAL JUDGE, BY HIS CRITICISM OF THE APPELLANT, PREVENTED HIM FROM PARTICIPATING IN THE PROCEEDINGS AND THUS DEPRIVED HIM OF A FAIR TRIAL.
(with respect to this point, appellant desires the court to read: Tr. 111, 112, 113)

At common law and under the Constitution, an accused charged with a felony is entitled to be present at every stage in the trial, Evans v United States, 284 F.2d 393 (6th Cir. 1960), 94 A.L.R. 2d 266; United States v Neal, 320 F 2d 533 (3d Cir. 1963) Root v Cunningham, 344 F 2d 1 (4th Cir. 1965), cert. denied, 382 U. S. 366, 86 S. Ct. 135, 15 L. Ed. 2d 104, so as to render assistance to his counsel. Thus, more physical presence is not sufficient. He must also be mentally present, and be allowed to take an active part in the proceedings, "for how can he make his defense" otherwise? Ashley v Peyton, 147 F 2d 313 (8th Cir. 1945), quoting from 4 Bl. Comm. 24.

It is not uncommon for the jury to watch the accused at the counsel table, throughout the trial, and particularly for his reaction to unfavorable testimony. His failure to respond to damaging testimony could well imply admission, consent or complete lack of interest, all of which would damage his case and favor in the eyes

and hear.

In order that the accused may actively participate in his trial, he must therefore be allowed to confer with his attorney, and so long as he does not vocally disturb the proceedings, he must also be allowed to express disapproval or disagreement by facial expression or by moveing his head in the negative when he believes to be the truth.

On the first day of the trial, and while one of the witnesses for the Government was testifying that she saw the defendant Blair in the vicinity of Lord & Taylor's a few days before the robbery, the trial judge stopped the testimony, and excused the jury to reprimand the defendant Blair on his silent expression of disapproval (Tr. 111):

"The Court: Stand up, Mr. Blair. (Defendant Blair stands.)

"I watched you since the beginning of this trial. I just noticed you moving your head in the negative when this lady identified you. Now from now on you listen to the witnesses but don't you display any disappointment or anything like that, do you understand that?

"DEFENDANT BLAIR: Yes, sir.

"THE COURT: Or I'll commit you for the rest of the trial, is that clear?

"DEFENDANT BLAIR: Yes, sir."

The admonition was then extended to both defendants Blair and Suggs, and they were further directed not to look at the judge "that way" (Tr. 111).

The explanation of Mr. Roberson, associate counsel for defendant Suggs, that the defendant was moving his head in response to a question directed to him by Roberson, was to no avail (Tr.112-113).

As a result, the defendant was placed in a most untenable position. He could have challenged the court's directive and insisted on his right to be present and participate in the proceedings or submit and hope for the best.

It is naive to believe that an innocent person, possessed of all his faculties, would sit silently and motionless while damaging testimony which he believes to be false is given about him

him by a witness. The jury knows that; and it, like the judge, must have been watching the defendant for his reactions.

The jury could not, if they would, shut their eyes to what is transpiring around them; and it is always proper for them to consider the conduct, deportment and demeanor of the accused while on the stand and in court. State v Hutchinsin, 95 Iowa 5[illegible]6, 64 N.W. 610 1895). Just as the expressions of the accused become part of his case, so is his lack of expression part of his testimony.

It is submitted, therefore, that to compel the accused to sit silently and motionless throughout a jury trial, on pain of going to jail for the balance of the proceedings, is to deprive him of a fair trial, for he is thereby deprived not only of his fundamental right to be present and participate in the proceedings, but is also compelled to testify, by his silence, against himself.

11. THE [illegible] BY THE TRIAL JUDGE TO COUNSEL [illegible] APPELLANT'S [illegible] DEPRIVED THE APPELLANT OF [illegible] COUNSEL, AND A FAIR TRIAL.

(with respect to this point, appellant desires the Court to read: Tr. 475-4[illegible], 492-493, 82[illegible]-829)

Equal to his right to be present and participate in the proceed-ings, the accused has a right to counsel of his choice. Glasser v United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (19[illegible]); McKinney v United States, 93 U. S. App. D. C. 222, 208 F2d 844 (19[illegible]).

The right of the accused to counsel is a "fundamental" and "substantial" one, and is not satisfied by mere token or formal representation. [illegible] v United States, 96 U. S. App. D. C. 162, 223 F2d 627 (1955); [illegible] v United States, 2[illegible] F2d [illegible] (9th Cir. 1961).

It has therefore been held, and is well recognized in this jurisdiction, that the right to counsel means the right to the "effective assistance of counsel". Powell v Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (19[illegible]), [illegible] A.L.R. 527; Mitchell v United States, 104 U. S. App. D. C. 57, 259 F2d 787 (195[illegible]), cert. denied 358 U. S. 850, 79 S. Ct. 81, 3 L. Ed. 2d 86.

Counsel must only be competent, but must [illegible]

-unity to [illegible]

States, supra). The accused is entitled to the undivided assistance of counsel of his own choice (Ferrine v United States, supra).

Any interference with the effectiveness of counsel, be that by means of undue criticism of defense counsel or undue intervention and disruption of the proceedings has variously been held prejudicial to the accused, for it may very well tend to 'unnerve' counsel and "throw him off balance so that he could not devote his best talents to the defense of his client." United States v Kelley, 314 F.2d 461, 463 (6th Cir. 1963); Young v United States, 120 U. S. App. D. C. 312, 346 F2d 793 (1965).

> "It is an important rule that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from the court that the interests of his client may not be prejudiced. That is not a matter of indulgence, but of right." Brock v United States, 53 App. D. C. 146 289 F. 544 (1923).

The abuse of counsel by the trial judge is not a matter of discretionary deviation, but rather a "substantial infringement of a right." 62 A.L.R. 2d 106, 177.

In the Young case supra, the trail judge criticised defense counsel for seeking assurance that every Jencks Act statement had been produced. This Court, reviewing the conduct of the lower court, said that the unwarranted criticism and the continuous intervention of the trial court in the proceedings may well have prejudiced the defendant's, notwithstanding the strong evidence against them. And, even if no prejudice to the defendants were apparent, the interests of public justice require that a trial be conducted by one who is disinterested and objective participant in the proceedings.

In the present proceedings, on the third day of trial, counsel for the defendant Blair attempted to obtain a ruling, from the trial judge as to the admissibility of testimony concerning police brutality on the part of certain officers who testified for the Government in its case-in-chief, for the purpose of showing bias and prejudice. (Tr. 477 et seq)

After a brief argument and proffer made by the defendant Blair, the trial judge severly reprimanded counsel for defendants for not reporting the incident of police brutality when it first came to their attention. Counsel for Blair protested that he was instructed not to report the matter, and the following took place (Tr. 487-488):

> "THE COURT: Don't you think that as an officer of this court, and under oath as a lawyer, that you had a duty to do something about this matter, if that had occurred, Mr. Anderson?
>
> "MR. ANDERSON: No, Your Honor.
>
> "THE COURT: I am thinking seriously of referring this case to the grievance committee. I will look into the matter.
>
> "All right, I think that's information that you as a lawyer and a member of this bar should have divulged to the proper authorities at that time.
>
> "MR. WILSON: Your Honor, I talked to the mother of the defendant--
>
> "THE COURT: I dont care who you talked to, the mother or anyone else. You owe a duty to this client of yours to divilge any brutality that existed. If it had been my client somebody would have heard about it.
>
> "MR. ANDERSON: Your Honor, I am still guided by my client's wishes."

There is no greater threat to the practicing attorney than the threat of punitive action taken before the grievance committee. Without his license, his livelihood is gone. To expect counsel for defendants to devote undivided interest, zeal and best talents to their defense of their clients, while their own professional well being is threatened, is to indulge in wishful thinking. Thereafter, counsel will be constantly and overcautiously on guard not to upset the trial judge in hopes that the incident might be forgotten and overlooked by the court.

"Effective representation of counsel", by necessity, implies the "undivided assistance of counsel of his own choice." Lawn v United States, supra. Counsel, generally, is selected for his supposed vigor, zeal and experience in the subject matter litigated and the client is entitled to the full and undivided effort and skill of his counsel to the fullest extent of his ability.

Blair and co-defendant Suggs selected their counsel to represent them in these proceedings, and as such, their choice should have been respected and they should have been entitled to the maximum effort and full time and attention of counsel of their choice. Such undivided attention and assistance reqire that there be no "conflict of interest" or "the additional burden of representing another party". Glasser v United States, supra.

It is submitted that it is just as improper, and is reversible error, to require counsel for one of the two defendants to represent both against the choice of the first, as it is to require counsel for Blair and Suggs to represent the defendants while guarding their interests, which interests were put in jeopardy, not by anything the defendants did, but by the conduct of the trial judge.

To determine the precise degree of prejudice sustained by defendants as a result of the criticism and threat leveled against counsel for the appellants, is at once both difficult and unnecessary.

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v United States, supra.

Aside from the conflict of interest issue presented, there can be no question that such a threat unnerved defense counsel and threw them off balance, and that the end result was that they could not devote their best interests to the defense of their clients, all to the prejudice of the appellants. See counsel's affidavits attached as Appendix A.

The prejudice suffered is further apparent from the proceedings that followed.

After the criticism and threats aforesaid, the trial judge summarily ordered inadmissible any testimony of bias and prejudice (Tr. 453), denied counsel for defendant Suggs a hearing on the matter, and recessed for the day (Tr. 459).

The following day, without prior warning to the defendants, the trial judge advised the parties that he changed his mind, and requested that further proffer be made of evidence regarding ploices brutality (Tr.492). This caught the defense off guard. All that Mr. Anderson could do was ask his client (Blair) to confirm that he (Anderson) was formerly asked not to report the police brutality. No further proffer of evidence of police brutality was made on behalf of Blair (Tr. 492-493). It is obvious that counsel for Blair was preoccupied with the threat of Grievance Committee action and was totally unprepared for the task at hand (Tr. 493).

The subject of police brutality and the refusal of the court to allow testimony concerning same, is treated at greater length in the brief of appellant Suggs, and, for the purpose of brevity, is hereby adopted by reference for the appellant Blair. Suffice it to say that counsel for appellant Blair did not pursue the matter "effectively" within the meaning of Mitchel v United States supra, and of United States v Doe, 132 U. S. App. D. C. 163, 352 F2d 639 (1963).

Appellant Blair does not challenge the skill aptitude or quality of his trial counsel. Counsel was of his own choice. He does, however, challenge the interference and criticism of the trial judge, and the resultant diminution in the effectiveness of his counsel. See Haas v United States, supra.

The effect of the criticism was actually felt by counsel for Suggs (see Appendix A attached), who was, in addition, subjected to criticism of her associate counsel (Mr. Roberson) for not sitting up straight at the counsel table and for looking at the judge ("like that") in a manner which seemed to displease the court (Tr.479). When Mr. Roberson protested that he was discussing the case, the judge retorted: "I don't care whether you are discussing the case, or not. If you don't like the way I try cases, please leave the courtroom. You're not any better than anyone else in this courtroom. You're not just another lawyer". (Tr. 479-480) Mr. Roberson was told to "shut up" or be "taken out bodily".

Mr. Roberson seemed to be looking at him, and, for the second time, ordered Roberson out of the courtroom. When Mrs. [illegible] interceded on behalf of her associate, the judge commented: "This is the way this whole thing of police brutality is being brought into this case." (Tr. 481)

It is respectfully submitted that the criticism and threats levelled at counsel for the defendants in these proceedings were much graver, serious and more damaging than found in the Young case, supra, and that the tension and pressure thus created effected them all and deprived the appellant of a fair trial.

111. THE [illegible] INTERVENTION OF THE TRIAL JUDGE IN THE PROCEEDINGS DENIED THE APPELLANT A FAIR TRIAL.
(with respect to this point, appellant desires the court to read: Tr. 452-460, 387-392, 1026-1027, 1036-1038)

The instances discussed above were not the only intervention by the trial judge in the proceedings. On the third day of the trial, after the prosecuting attorney finished his cross-examination of a witness for the defendant Blair, the trail judge, out of the presence of the jury, cross-examination the witness at length (Tr. 452-456-b). At the conclusion of his cross-examination, the judge stated that the witness was "lying" and that he, the judge, "would not believe a word he said on a stack of bibles" (Tr. 456-b).
The jury was then called back, and the witness subjected to a repeated cross-examination by the prosecuting attorney, who covered the material covered before (Tr. 457-460). The effect on the morale of the witness [illegible] by the judge that he is a liar and unbelieved "on a stack of bibles", is obvious, not to mention the effect his subsequent repeated cross-examination had on the jury. Whatever the witness is, it is not the province of the trial judge to unnerve him or throw him off balance so that his subsequent testimony would sound unbelievable.

On another occasion, on the fifth day of the trial, at the conclusion of the examination of defendant Blair, suggested that the government question Blair concerning his prior convictions (Tr. [illegible]). At the conclusion of the new cross-examination, the trial judge proceeded to instruct the jury at length on the effect of an admission of prior convictions on the testimony of the defendant [illegible].

similiar instruction was given at the conclusion of all the testimony on the seventh day of trial (Tr. 1303).

It is obvious that the jury did not believe Blair; otherwise he would have been found not guilty of all the charges brought against him. To what extent the intervention of the trial judge in the proceedings effected the outcome of the case, is obviously impossible to determine. Suffice it to say that:

> "...even if no prejudice to the defendant's were apparent, the interests of public justice require a trial conducted by one who is a 'disinterested and objective participant in the proceedings'. Young v United States, supra, at page 796, quoting from Billeci v United States, 87 U. S. App. D. C. 274 283, 184 F2d 394, 403 (1950), 24 A.L.R. 2d 881.

The interrogation of witnesses should be left to counsel, Jackson v United States, 117 U. S. app. D. C. 325, 329 F2d 893 (1964).

IV. THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY THAT FAILURE TO RESIST OR PREVENT A CRIME, AND MERE NEGATIVE ACQUIESCENCE, DOES NOT CONSTITUTE "AIDING AND ABETTING".
(with regard to this point, appellant desires the court to read: Tr. 464-468, 864, 865, 868, 871-874, 1291-1293)

At the conclusion of the case, the judge instructed the jury, inter alia, on the law concerning "aiding and abetting", and gave the jury a number of examples to explain the principle involved (Tr. 1291-1293). The appellant does not challenge the correctness of the instruction on the law of "aiding and abetting", nor its examples, as given. He contends, however, that in the present case, the court should have gone further and instructed the jury by example or otherwise that the failure of the accused (Blair) to resist or prevent the crime being committed in his presence or within his knowledge, is not sufficient to bring him within the definition of "aiding and abetting" in the offense. United States v Williams, 341 U. S. 58, 71 S. Ct. 595 (1951) 95 L. ed. 747. Similarity, mere negative acquiescence is not sufficient. Johnson v United States, 195 F2d 673 (8th Cir. 1952): United States v Dellaro, 99 F2d 781 (2d Cir. 1938).

Blair testified that he had sufficient reason to believe that a criminal act was going to perpetrated by the driver and the other passengers of the vehicle in which he was a passenger (Tr. [illegible], 865), but steadfastly contended that he was neither a party to the scheme nor a participant (Tr. [illegible], [illegible]). In fact, he protested the deviation from his appointed destination (Tr. [illegible], [illegible]).

The example given by the court (Tr. 1297) of a salesman that happened to knock on the front door when a crime was being committed in the premises, surely has no relevance to the facts of the case.

The instruction suggested herein would have been especially appropriate in light of the cross-examination and suggestion made by the prosecuting attorney that Blair did nothing to prevent the crime unfolding before him (Tr. 363), or thwart the attempted flight that followed (Tr. 373-374). The implication was that Blair, by his silence and failure to intercede and prevent the commission of the crime, or his failure to stop the car from escaping the pursuing police, aided, abetted or assisted the offenders by his seemingly negative acquiescence.

We find no law which requires a private citizen to resist the commission of a crime of which he has knowledge, or attempt to prevent the escape of the criminals.

Having allowed the questions on cross-examination, the trial judge should have instructed the jury that should they believe Blair that he actually had no part in the planning or execution of the crime, but merely chanced to be in the same car with the criminals and saw a crime being committed (in its inception), he is not to be considered as an aider and abettor.

It is therefore submitted that the jury was misled by the example given and therefor found Blair guilty of aiding and abetting in the robbery, whereas he was found not guilty of the remaining charges.

Counsel is mindful that no objection was registered by the trial attorney for Blair (Mr. Anderson) at the conclusion of the charge, as is required by Rule 30 of the Federal Rules of Criminal Procedure. It is submitted, however, that his failure to object and offer an additional charge to correct the inaccuracy, is not

one example of the ineffectiveness of the representation which Blair was caused to receive following the criticism and threat made by the trial judge and directed at defense counsel.

In this connection, appellant requests the court to consider the error under Rule 52 (b) of Federal Rules of Criminal Procedure.

CONCLUSION

For the reasons assigned, it is urged that the judgment of conviction against the appellant Blair be reversed.

Respectfully Submitted,

X Clarence Blair
Clarence Blair, Appellant
Box 25,
Lorton, Virginia 22079

CERTIFICATE OF SERVICE.

I, Clarence Blair states that I have forwarded a copy of the foregoing Brief to the United States Attorney at his office, U. S. District Court House, John Marshall 11 & Constitution Avenue, N. W. this _____ day of September 1968.

X Clarence Blair
Appellant

Subscribed to and before me this 13 day of September 1968.

Clayton Hoyer
Notary

APPENDIX A

DISTRICT OF COLUMBIA ss:

Floyd W. Anderson being first duly sworn deposes and says that he was counsel of record for the defendant Clarence Blair at the trial level in United States v. Clarence Blair criminal number 573-66, that the attitude of the trial judge toward the case and toward counsel and more particularly the threat of grievance committee action against counsel, had a direct affect on counsel's representation of the defendant Clarence Blair

Floyd W. Anderson

Subscribed and sworn to by me this 16th day of November, 1967

Notary Public

My Commission Expires May 31, 1969

UNITED STATES COURT OF APPEALS

UNITED STATES *

vs

JAMES LEE SUGGS *

A F F I D A V I T

DISTRICT OF COLUMBIA, ss:

I, Dovey J. Roundtree, being duly sworn upon oath deposes and say as follows:

1. That I am a member of this bar in good standing.

2. That I represented James Lee Suggs in the Court below.

3. That as trial counsel for defendant Suggs, I honestly believe pressure and tension was brought to bear upon me by the Trial Court. My co-counsel was castigated, ordered from the Court Room because the Court did not like the expression on his face. Alan V. Roberson was my co-

counsel. That I begged the Court to re-consider its ban of my co-counsel but even when this request was granted, I feared the Court's ire thereafter.

4. That counsel for the defendant Blair was threatened with punitive sanctions- Grievance Committee procedure- at one point during the trial, and I felt this too, was directed to me.

5. That throughout the trial I was uneasy, fearful to the point that I felt that I was on trial, this continued up through the sentencing of Suggs.

Dovey J. Roundtree
DOVEY J. ROUNDTREE

SUBSCRIBED and SWORN to before me this 28th day of November, 1967.

Lonnie W. Oliver
NOTARY PUBLIC, D. C.

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

No. 21034 *

JAMES L. SUGGS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the District of Columbia

FREDERICK H. WALTON, JR.
Counsel for Appellant
(Appointed by this Court)

938 Bowen Building
Washington, D. C. 20005

* Consolidated for appeal with Blair v. United States, No. 21033.

STATEMENT OF QUESTIONS PRESENTED

(1) Where after trial a person is found guilty under an indictment framed on a complaint of armed robbery of a corporation, may the District Court lawfully pyramid the punishment to a maximum of 45 years imprisonment by imposing as consecutive sentences to a 15 year maximum sentence for robbery three 10-year sentences on counts of assault with a dangerous weapon separately stated against each of three individual employees of the corporate victim present at the robbery and from whose custody and control corporate property was taken.

(2) The question is whether in a trial upon an indictment for robbery and other related counts the court, after hearing outside the presence of the jury, erroneously sustained government objection to any evidence going to the jury of brutality claimed by appellants to have been inflicted on them by police witnesses, thereby depriving appellants of their right to present such evidence for impeachment of such witnesses.

(3a) Did the District Court err in allowing the prosecution unrestricted use of inadmissible statements given by the defendant during police interrogation between arrest and delayed presentment, to impeach and discredit appellant's entire defense as given upon taking the stand.

(3b) Did the District Court err in totally withholding from the jury, after hearing evidence out of the presence of the jury, the defendant's testimony and evidence of physical beating by the police which preceded in-custody statements given during police interrogation.

(4) Was it reversible error for the trial court to omit instructions on asportation as an element of charged crime of robbery.

(5) Where credibility was a key issue in appellant's trial, was appellant unduly prejudiced by the trial court's failure to exclude misstatements of the testimony and interrogation by the prosecution to impeach and discredit appellant and his chief alibi witness unfairly.

(6) Should the trial court have excluded evidence of money and of a bullet found on the appellant and of a fingerprint of appellant found on a newspaper on the ground of its insufficiency as circumstantial evidence to support a conviction of robbery.

(7) Were the comments made by the trial judge, criticizing the demeanor of the defendants and their attorneys and implying professional misconduct on the part of the attorneys, coupled with the intervention of the court in the proceedings as an advocate for the government, sufficient to create an atmosphere wherein the defendants could not receive a fair trial, and effective assistance of counsel.

* JAMES L. SUGGS,

Appellant,

vs. No. 21034

UNITED STATES OF AMERICA

Appellee.

* Consolidated on appeal with Blair v. United States, No. 21033

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JURISDICTIONAL STATEMENT

Appellants, Blair and Suggs, were indicted May 3, 1963 on a common count of robbery--DC Code §22-2901; three common counts of assault with a dangerous weapon (one for each of three named individuals)--DC Code § 22-502; and separate counts for carrying a concealed weapon--DC Code § 22-3204. After pleading not guilty, both Blair and Suggs were tried and found guilty on the joint robbery count and on the individual counts for carrying a concealed weapon. Additionally, while Blair was found not guilty on each of the three counts for assault with a dangerous weapon, Suggs was found guilty on each. On May 4, 1967, appellants Blair and Suggs were sentenced to the maximum of 15 years imprisonment on the robbery count and given concurrent sentences of one year in prison for the concealed weapon charge. In addition, appellant Suggs was given maximum 10 year sentences of imprisonment on each of the three counts of assault with dangerous weapon, to run consecutively with the robbery sentence for an aggregate maximum sentence of 45 years imprisonment. Leave to proceed on appeal in forma pauperis without prepayment of fees and costs was properly filed.

The United States District Court for the District of Columbia had jurisdiction under Section 521 of Title 11 and Section 401 of Title 24 of the DC Code (1967 Ed.).

This Court has jurisdiction pursuant to Section 1291 of Title 28 of the United States Code.

STATEMENT OF CASE

Appellant adopts the statement of the case in brief of appellant Blair and supplements the same in the following respects. At the trial appellant testified in his own defense. Tr. 989. He was arrested soon after 3:13p.m./(Tr. 177) in the vicinity of the abandoned getaway car by Police Officer Jacob and his partner on motorcycle detail, Officer Schroeder. (Tr. 550, Hearing) Tr. 1002. At the trial a critical credibility issue developed from the direct conflict in the government and defense versions of the arrest and in some of the post arrest events. Appellant testified that he had just come from his mother-in-law's house at 5415 5th Street, N. W. in the company of his brother, Charles, and a friend of the latter. Tr. 990, 997. At 5th and Hamilton Streets, N. W. appellant witnessed the abandonment of the getaway car used in the Lord & Taylor robbery. Tr. 999. He saw two of the robbers leave the car and disappear in the alley south of Hamilton Street followed by two motorcycle policemen. Tr. 1000-1. Soon after, one of these officers, Joseph Jacob, came walking back carrying a bag with a pistol in his belt. Tr. 1003. When appellant was unable to produce identification demanded by Officer Jacob but did produce $332 cash in bills, he was promptly arrested, handcuffed, thrown to the ground where he received several severe kicks from Officer Jacobs and from Officer Schroeder who had by then joined in the arrest. Tr. 1002-3. These details of appellant's arrest were corroborated by testimony of Charles Suggs, his brother. Tr. 943, 943-50. Eyewitness corroboration of the presence earlier of appellant with two companions near the scene of arrest was given by defense witness, Mrs. Turner, a government employee, who lived in the neighborhood and was returning from work.

Tr. 893, 896. She talked to appellant briefly at a time prior to the arrest, which established that appellant could not have participated in the robbery charged. Tr. 895-6.

The government's version of the arrest as presented by the two arresting officers was in direct conflict. They testified to following on their motorcycles (Tr. 213) the two robbers who fled from the getaway car into the south alley. Tr. 179-182, 207-8. The two were seen to disappear through an alley garage, at the back of a Gallatin Street house. Tr. 180. When Officer Jacob moved to a position where he could observe the other side of the garage, he saw appellant crouched over a bag with his partner. Officer Schroeder proceeded to arrest appellant and give him a quick "pat down" search which disclosed nothing. Tr. 181-2, 186-7, 202. The record is silent as to the acknowledged escape of the robber who was in appellant's company, according to the police version. The contents of the bag included a pair of gloves and Lord & Taylor money and gift certificates. Tr. 183-4. Beneath the bag the arresting officers claimed to have retrieved a pistol with full clip. Tr. 185-6. They also later recovered, lying in the alley along the path of flight, a pillowcase with more money taken in the robbery. Tr. 190-1.

The government presented no other witnesses or evidence concerning the arrest in its case in chief. It did produce in rebuttal a resident, Mrs. La Noir, who testified that she was in her back yard and saw two colored persons chased down the alley by two police officers. Tr. 1210-2. From her description of this chase it appeared that both robbers disappeared. Tr. 1212. Later she saw the police appear with one person in custody whom they searched. Tr. 1213. Officer Jacob saw

no one in the alley. Tr. 198.

At police headquarters, 15 or 20 minutes after arrival (Tr. 552, Hrg.), appellant claimed he was again beaten briefly by other police than the arresting officers because he refused to acknowledge participation in the robbery (Tr. 583-6, Hrg.). He was then questioned at some length (beginning at 7:55 PM--Tr. 1217) by Detective Hannon of the Robbery Squad (Tr. 1214), who typed up a statement which appellant refused to sign. Tr. 338-9, 1005, 1122-3, 1128, 1217-8. During this process, with Officer Jacob present, appellant was searched. Tr. 1230. Both Jacob and Hannon claimed to have recovered a whole bullet from appellant's pocket (Tr. 188-9, 1230), of which appellant denied any knowledge. Tr. 567, Hrg.; 1008-9. Appellant, on the other hand, testified that he was asked to empty his pockets, which he did and was given a receipt for a chapstick and $562 in cash. Tr. 1005, Def. Ex. 9; Tr. 1007, 1008.

The only other circumstantial evidence offered by the government was a single middle finger print upside down on a page of a copy of that day's 80-page Washington Daily News found that night on the floor of the impounded getaway car. Tr. 360-1, 328-9, 1164, 1166-8. During this period of questioning and search, appellant requested and was refused access to any lawyer. Tr. 553. There is no evidence in the record that any warning to appellant was given regarding his rights to counsel or to refuse self-incrimination. At a bench conference

appellant's trial counsel informed the court that appellant was not advised of his rights. Tr. 1219. Appellant was fingerprinted at about 10:30 p.m. some three hours after arrival at headquarters. Tr. 1159. This followed a confrontation with the three Lord & Taylor employees present at the robbery who were brought before appellant. Tr. 1011. None was able to identify him as a participant in the robbery. Tr. 1011. This was also the first time that day that appellant saw appellant Blair. Tr. 1011. Appellant Blair who was brought to police headquarters after separate arrest and who was questioned apart from appellant Suggs (Tr. 654) had admitted occupying the getaway car before and after the robbery. His identification of the three participants in the robbery excluded appellant Suggs (Tr. 464-5, Hrg.)--a fact included as part of a written but unsigned statement Blair gave to police before he saw appellant Suggs that day (Govt. Ex. 19, for identification Tr. 854) Tr. 879-81, 523-4.

During the trial the trial judge either by remarks to the appellants or to their trial counsel or by undue interference and participation in the proceedings prejudiced the appellant's right to a fair and impartial trial. The instances listed in the brief of appellant Blair are joined in and adopted by appellant Suggs and will not be repeated here. Additional instances are referenced infra in argument under the seventh listed assignment of error. Likewise in argument infra, under the fifth listed assignment of error are details, with transcript references, of prejudicial interrogation and statements by the prosecution and other disparagement of the appellant. At the conclusion of the evidence the trial court in instructing the jury on the elements of the crime of robbery excluded all reference to asportation as such an

element. Tr. 1284-6.

STATUTES AND RULES INVOLVED

DC Code (1967 Ed.) Title 22, Sections 502 (assault with dangerous weapon); 2901 (robbery); 3201 (possession, sale, transfer and use of dangerous weapons--definition); 3202 (committing crime when armed--added punishment); and 3204 (carrying concealed weapons). Rule 5(a) of the Federal Rules of Criminal Procedure. Text of relevant parts of the foregoing appears in Appendix hereto.

STATEMENT OF POINTS

(1a) The statutory maximum penalty for a single armed robbery cannot lawfully be exceeded by stating includable offenses in separate counts and then pyramiding penalties for conviction on each such count.

(1b) Nor was it lawful for the District Court to pyramid penalties for conviction on counts separately charging the identical offense against each of three different individuals subject to a single common assault.

(2) The trial court erred in totally excluding evidence proffered by the defense for impeachment of the testimony of police witnesses for bias and hostility as evidenced by the physical beatings inflicted by such witnesses on appellants.

(3) The trial court erred in allowing, for impeachment of appellant's ~~only~~ defense, unrestricted use by the prosecution of inadmissible in-custody statements given by the appellant to the police, which error was aggravated by the court's exclusion from the jury of all defense evidence of bias and hostility to impeach certain key police witnesses.

(4) The trial court erred in failing to instruct the jury on an

essential element of the crime of robbery.

(5) The trial court erred in allowing the prosecution to discredit the appellant or his defense before the jury by prosecution statements unsupported by the record evidence and by improper and prejudicial interrogation.

(6) The trial court erred in allowing circumstantial evidence against appellant to go to the jury for which insufficient evidence was available to exclude reasonable doubt.

(7) Appellants were deprived of a fair trial and effective assistance of counsel by the trial judge's criticism of the appellants and their counsel and by the trial judge's undue intervention in the proceeding.

SUMMARY OF ARGUMENT

(1) Congress by statute has prescribed the added penalty to be imposed for armed robbery in the District of Columbia. Appellant's sentence which substantially exceeded this maximum was illegally imposed where a single act of armed robbery was proved. The policy of lenity in the decisions of this court in Ingram v. United States[1/] and Davenport v. United States[2/] precludes the interpretation of law by the court below that unless affirmative expression of the legislative will denies it, the full discretion of the trial court to impose consecutive sentences upon conviction on separate counts, is to be upheld even for in-

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1/ 122 App DC 334, 353 F2d 872 (DC Cir. 1965)

2/ 122 App DC 344, 353 F2d 882 (DC Cir. 1965)

cludable offenses of a single criminal episode. Moreover the Bell and Ladner decisions[3] of the Supreme Court preclude the sentencing action of the trial court in imposing consecutive sentencing for conviction on three counts charging the same offense but separately naming the three persons who were the objects of a single common assault.

(2) The trial court erred in refusing to allow the jury to receive and decide factual evidence of police brutality alleged by the appellants. The total exclusion of such evidence to impeach testimony of police witnesses as showing bias or hostility was critically prejudicial to appellants and contrary to established precedent which declares such evidence to be "always relevant" where credibility is a substantial issue which it was in the case at bar. Vellaroman v. United States.[4]

(3) The trial court erred in allowing the prosecution unrestricted use for impeachment purposes of in-custody testimonial statements made by appellant during police interrogation in a case where such statements were inadmissible against appellant under the Miranda and Mallory rules. The wide latitude afforded to the prosecution in discrediting appellant's only defense, his alibi defense, totally undermined the wholesome policy of the Weeks case[5] to preserve and protect the right of an accused to take the stand in

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3/ Bell v. United States, 349 US 81 (1955);
Ladner v. United States 358 US 169 (1958)

4/ 87 ~~App DC 240, 184 F2d 281, 21~~ ALR2d 1074 (DC Cir. 1950)

5/ Weeks v. United States 232 US 383 (1914)

his own defense without facing impeachment of his testimony before the jury through use against him of inadmissible statements. The prejudice suffered by appellant was particularly severe where the trial court by ruling deprived the jury of the right to hear evidence of police brutality that preceded appellant's post arrest interrogation at which the already mentioned inadmissible statements were made. The jury should have been allowed to evaluate properly the context and circumstances in which the inadmissible statements had been given.

(4) The decisions in this jurisdiction require that the trial court instruct the jury on every necessary element of the crime charged. It was error, therefore, for the court below to omit any instruction to the jury on asportation as a necessary element of the crime of robbery.

(5) The prosecution was permitted to discredit the credibility of appellant and his brother, a principal alibi witness, by statements before the jury not supportable by the record and by unfair and improper forms of interrogation of defense witnesses. The cumulative effect of such discrediting attacks was highly prejudicial to the appellant because of the crucial nature of the credibility issue to the jury's determination of which version of the facts it would accept. An accused has the right to be protected from conduct by the prosecution which would improperly prejudice the defendant before the jury and it was error for the trial court not to have excluded such matter from the trial.

(3) Circumstantial evidence offered by the prosecution at the trial against appellant should have been excluded because the evidence was such that a reasonable doubt must be entertained. The proof

adduced by the prosecution was insufficient in each case to overcome the reasonable doubt that would otherwise have to exist in the mind of the jury and to avoid jury decisions on significant aspects of the evidence dependent on speculation rather than on fact.

(7) This point is common to appellants as co-defendants in the joint trial below presented and argued as the first assignment of error in the brief of appellant Blair in companion case No. 21033. It is adopted by appellant Suggs without separate argument and urged as a separate ground for reversal in his appeal. The instant brief will, however, refer this court to additional instances of such errors in the conduct of the trial during the presentation of appellant's defense in the trial below.

ARGUMENT

1. (A) Statutory Maximum Penalty for Single Armed Robbery Cannot Be Lawfully Exceeded By Stating Includable Offenses in Separate Counts and Pyramiding Penalties for Conviction on Each Such Count

(With respect to Point 1, appellant desires the court to read the following pages of the reporter's transcript for the May 4, 1937, sentencing hearing - Tr. 1-21 incl.)

At issue on this aspect of the appeal is the legality of the trial court's sentencing action in pyramiding penalties by imposing consecutive sentences on appellant Suggs to a maximum term of imprisonment of 45 years. This result was achieved by aggregating maximum sentences on the appellant's conviction for one count of robbery (15 years) and on each of three counts of assault with a dangerous weapon (10 years), which individually and respectively named the three em-

ployees of the corporate owner of the property stolen in the robbery. This sentencing action was clearly illegal and must be set aside. Under the provisions of 22 DC Code § 3201-2 (1937 Ed.), (for text see appendix) Congress has established the added penalty and maximum punishment for armed robbery which upon a first conviction may not exceed a 20-year maximum term of imprisonment, i.e., a 5-year add-on to the 15-year maximum term for robbery under 22 DC Code § 2901 (1967 Ed.).

These cited Code provisions were enacted in 1932 by passage of the "Firearms Control Bill" (72nd Cong., 1st Session, HR 8734 - S. 2751). In Senate Report 9488, on this bill, the purpose of the bill included the following statement:

> "5. Imposition of penalties for commission of a crime while armed, in addition to the penalty for the crime." p. 2

The report further stated with respect to this feature of the bill as follows:

> "Penalties for Committing Crimes of Violence When Armed The bill proposes the imposition of penalties for committing crimes of violence when armed. These penalties would be in addition to those already provided by law for such criminal offenses, and range from a maximum of five years for a first conviction to a maximum of 30 years for a fourth or subsequent conviction." Ibid.

By these laws, Congress declared its intention as to the maximum penalty that would be appropriate or could be imposed in a case of armed robbery.

Notwithstanding the fact that it was clearly Congress' purpose to limit to 20 years the maximum penalty for a first conviction in a case of armed robbery, the court below upon a first conviction of

appellant for a single armed robbery utilized the device of consecutive maximum sentences to fix a maximum term of 45 years--which exceeded the statutory maximum for armed robbery by more than 125%.

In the Opinion (para. 2) filed May 4, 1967, by the court below, upholding the court's power to impose consecutive sentences in this case, the court noted the provisions of 22 DC Code § 3202 as applicable to armed robberies. The court, however, concluded that this provision of the Code did not limit the court's discretion to impose consecutive sentences in this case and stated its grounds as follows:

> "There is nothing about either of these statutes which indicate to the Court that either or both of them are to be the exclusive means whereby heavier sentences may be imposed in cases of combined robbery and one or more assaults with a dangerous weapon--as opposed to robbery without a weapon. On the contrary the very existence of these statutes is clear indication to me that Congress intends and expects more severe penalties in cases of robberies committed with threat of deadly weapons--especially firearms as in this case.
>
> "Accordingly, it is my view that it is entirely proper to increase the punishment where there have been convictions under the conventional robbery statute and under the statute prohibiting assaults with a dangerous weapon by imposing consecutive sentences." Para. 2

Although there is no statutory language specifically making 22 DC Code § 3202 the exclusive means for a heavier penalty in an armed robbery than in a simple robbery, the absence of such specificity as to exclusivity or non-exclusivity is without significance. It certainly required no citation of authority to accept the common sense logic of the proposition that when Congress, as the legislative authority for the District of Columbia, describes armed robbery as an offense for

which a first conviction would allow increase by 5 years of the 15-year maximum term of imprisonment for simple robbery, Congress by that statute is not at the same time authorizing or allowing still heavier sentences for a single armed robbery to be imposed by the device of fragmentation of that offense into lesser and includable offenses so that consecutive sentences on each component may be imposed and the stated § 3202 maximums be exceeded by substantial amounts.[6/] The excessive and illegal sentence imposed by the court below is even more clearly evident when it is found by reference to 22 DC Code § 3202 that appellant as a first offender on convictions arising out of a single armed robbery received through pyramiding an additional penalty of 30 years which Congress in § 3202 reserved as the allowable additional penalty only for the worst repeated offender for armed robbery.

Equally important in the interpretation of 22 DC Code § 3202 is the guidance available from the opinion of this court in the Ingram case, supra.

> "Moreover, DC Code § 22-3202 provides that a person who commits a crime of violence when armed with a pistol or other firearm shall be punished by imprisonment up to five years 'in addition' to the punishment for the other crime. If Congress had intended to punish an assault with intent to kill committed with a knife more severely than an assault with

6/ The 45-year cumulative maximum term of imprisonment for appellant in this case thus exceeds by three times the maximum term of imprisonment specified by Congress for manslaughter, 22 DC Code § 2405 (1967 Ed.), while the cumulative minimum term of 15 years imposed on appellant as a first offender is equal to the up to 15-year imprisonment that can be imposed as a minimum sentence by 24 DC Code § 203 (1967 Ed.) in a case where the maximum sentence is life imprisonment.

> intent to kill, but without such a weapon, it could have done so in similarly clear manner."
> 122 App DC at 337, 353 F2d at 875.

By this language it is evident that this court regards § 3202 as declaring in a "clear manner" the intent of Congress as to the added maximum punishment that may attend the use of a firearm in a robbery. It is submitted that as a matter of law in the case at bar the maximum sentence that the District Court could legally have imposed on appellant Suggs for the counts on which he was convicted was 20 years and not the 45 years which were illegally imposed by the court below.

As a further consideration, it may be observed that the District Court's opinion implies that had the robbery been accomplished by simple assault without dangerous weapons, the assault would have been an includible offense merged as an element of the more serious crime of robbery and not separately punishable. By analogy, it would be logical to conclude from this that when Congress defined the maximum added penalty that could be imposed for a robbery in which the essential element of assault was accomplished by use of a firearm, Congress defined a criminal offense--armed robbery--in which assault with a firearm is not a separate and distinct offense but an includible necessary element to the offense of armed robbery which requires proof of the same facts in establishing that element. Such being the applicable legal principle, it was beyond the power of the government in prosecution and of the judge in sentencing to circumvent the maximum added penalty prescribed by the Congress for an armed robbery, through use

of the device of separate counts for a simple robbery and for the aggravated assault (i.e., use of dangerous weapon) as though factually separate offenses had been committed when in fact only a single act of armed robbery occurred or was proved.

In terms of the proof adduced by the government at the trial, it is clear that the evidence necessary to prove assault with a dangerous weapon was the identical evidence required to prove an assault as an indispensable element of the robbery. In the words of the trial court, ". . .I don't see there is any evidence in this case that would warrant a verdict of simple assault, it is either assault with a dangerous weapon or nothing from the evidence in the case. . ." Tr. 318. The merger of the assault with a dangerous weapon as a factually indispensable element of and includible offense with the robbery clearly distinguishes the case at bar from other cases in which separate criminal acts are committed not necessary or indispensable to proof of an essential element of the principal offense charged. It was error. therefore, for the court to treat as additionally punishable an assault, which in the factual context of the case, was an inseparable part of a single criminal episode of armed robbery. "The Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being tried twice for it." Ex parte Lange 85 US (18 Wall.) 163, 173 (1873)

Even if, arguendo, doubts were entertained concerning the conclusiveness of the preceding argument in establishing the illegality of appellant's sentencing, such doubts would only serve to establish the illegality of

the sentencing on different grounds, i.e., the rulings of this court in the two most recent cases invalidating consecutive sentencing in the District of Columbia, i.e., Ingram and Davenport supra[7/] In the instance of doubt, this court held in the Ingram case, supra:

> "Doubts in this area of the law are resolved not only in favor of lenity but in favor of rational and reasonable probabilities of legislative intent where such intent is left clear." 122 App DC at 337, 353 F2d at 875.

In the instant case, the District Court erred because it resolved all doubts not in favor of lenity but in favor of the opposite result, i.e., pyramiding of penalties. Moreover, as shown in the preceding discussion of the Firearms Control Act, "Rational and reasonable probabilities of legislative intent" would require the conclusion that Congress made clear in 22 DC Code § 3202 (1967 Ed.) the penalty it intended for armed robbery.

The key error, made by the court below in the light of the Ingram and Davenport decisions is that whereas these decisions declare that consecutive sentencing for separately defined offenses arising from a single criminal act may be imposed only where the intent of Congress is clear to allow pyramiding of penalties, the District Court concludes that it may interpret Congressional intent as clearly author

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7/ In the Ingram case for a single knife attack, consecutive sentences were imposed for conviction on separate counts of assault with intent to kill and assault with a dangerous weapon. In Davenport for a single fatal shooting, consecutive sentences were imposed for convictions on separate counts of assault with a dangerous weapon and manslaughter.

izing pyramiding of penalties on convictions for separately defined statutory offenses unless Congress has affirmatively declared a contrary intention. However, this court has already ruled in Ingram and Davenport that examination of the language and history of two general criminal statutes (such as assault with intent to rob and assault with a dangerous weapon in Ingram and assault with a dangerous weapon and manslaughter in Davenport) is inconclusive as to the intention of Congress in authorizing consecutive sentencing for convictions on "concededly distinct offenses arising out of the same act."[8/] As in these cases, the case at bar involves only offenses against the person, i.e., assault with a dangerous weapon and robbery arising out of the same criminal act or transaction.[9/] There is no room, therefore, in the rulings of this Court for the erroneous conclusion of the District Court that it could infer an intent by Congress to allow consecutive sentencing in these circumstances simply because Congress had not affirmatively declared an intention to prohibit such sentencing. As this court said in Ingram, supra, regarding the convictions therefor (1) assault with intent to kill and (2) assault with a dangerous weapon:

> "Congress created no crime of assault with a deadly weapon with intent to kill. It would be pure speculation to conclude that Congress intended the punishment for such a single assault

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8/ Davenport v. United States, supra, 122 App DC at 345, 353 F2d at 883

9/ Distinguish Irby v. United States No. 19988 decided November 17, 1967, on rehearing en banc where consecutive sentences were imposed on housebreaking and robbery--historically different crimes against property and the person respectively.

> to permit the consecutive sentences imposed in this case." 122 App DC at 337, 353 F2d at 875.

Applied to the circumstances of the instant case, it is submitted that the District Court indulged in such "pure speculation" as a justification for imposing consecutive sentences.

In its sentencing opinion the District Court relied on the United States Supreme Court decision in Gore v. United States[10/] as support for the court's sentencing action. Such reliance was completely misplaced, as was made clear by the decision of this court in Ingram which specifically discussed and distinguished the Gore decision. This court said in referring to Gore and similar Supreme Court decisions:

> "From the foregoing review it is seen that the Court has looked in each case to the behavior against which the statute was directed and to the intent of Congress. It has found justification for consecutive sentences only in the narcotics area. In other instances merger, lack of explicit intent and a policy of lenity have been held in varying combinations to preclude consecutive sentences." 122 App DC at 336, 353 F2d at 874[11/]

This court's decision in Ingram then distinguished the problem of discernment of Congressional policy and intent when Congress, as in the field of narcotics, is dealing with special legislation, in contrast to Ingram, Davenport, and the instant case in which general criminal

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10/ 357 US 383 (1958)

11/ It may be interjected at this point that in the case at bar all of the "varying combinations" referred to in the quotation are present to preclude consecutive sentencing.

statutes are involved. This court noted that the answer is not readily supplied by the simple test applied by the court below of determining whether the offenses were separately and distinctly defined. It is not to be found in a statement that "punishment may be twofold" because a single act constitutes a violation of two distinct offenses which are "commingled." Rather the key is whether "two punishments were intended by Congress." This court then held that

> "In Gore. . .the [Supreme] Court was clearly of the view that Congress affirmatively intended each of the offenses to bear its own penalty, in aid of the determination of Congress to use severe methods to stamp out the traffic in narcotics." 122 App DC at 337, 353 F2d at 875.

No such clear intent exists in the case at bar and the District Court's effort to find such an intent by speculative inference is contrary to the decisions of this court and is invalid.

1.(B) It was also Unlawful for the District Court to Pyramid Penalties for Conviction on Counts Separately Charging the Identical Offenses Against Each of Three Different Individuals Subject to a Single Common Assault

As recited in the Statement of Case, (brief of appellant Blair) Messrs. Stewart, Nordgren and Vaisey, employees of Lord & Taylor Department Store, were the object in common of a single assault[12/]

12/ Although in the Opinion filed by the court below incident to sentencing of the appellant, the court characterized the assaults as "three separate assaults with a dangerous weapon," it is clear from the context of the statement that the characterization referred to the assaults as "separated by both time and distance from the robbery" and not as being separated one from another.

consisting of threats of violence made by the armed robbers which led to the taking of store property from their presence. In these circumstances the District Court imposed the maximum 10-year term of imprisonment authorized by 22 DC Code § 502 (assault with a dangerous weapon) and by making the sentences consecutive. The penalty for the assault alone was thus pyramided to a maximum of thirty years.[13] In this connection, it is believed significant as bearing on the obvious excessiveness of the penalties imposed by the District Court that Mr. Stewart, named in count two as the victim of the assault which cost the appellant a 10-year sentence, was also named in count one as the victim of the robbery of store property, which cost the appellant a 15-year maximum sentence.[14]

The argument that follows contends that independently of the error in pyramiding penalties on convictions of robbery and assault with a dangerous weapon which are part of a single act of armed robbery, it was error as a matter of law, for the appellant to be sentenced to a maximum term of imprisonment of 30 years by virtue of the fact that three store employees were threatened with violence rather than two or only one and that three counts for the same offense

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13/ As previously noted these sentences were in turn pyramided on the 15-year maximum sentence imposed on the conviction for robbery to make the imposing total of 45 years for a single armed robbery involving a first offender.

14/ It is believed that this example of pyramided penalties involving the same victim of the same armed robbery well illustrates the unsoundness and unreasonableness of the sentencing court's interpretation of the legislative will as authorizing consecutive sentences in such circumstances.

were framed, each naming a different person, who was subject in common to the threatened violence by which the robbery of the store was accomplished.

The error of this aspect of the District Court's sentencing of the appellant is made evident by reference to two leading U. S. Supreme Court decisions.[15/] In the Bell case, the Supreme Court reversed a Court of Appeals decision affirming a District Court sentence imposing consecutive sentences on each of two counts for Mann Act violations, each referring to a different woman. It was conceded in that case that the accused had transported the two women on the same trip and in the same vehicle. The Court of Appeals had sustained the consecutive sentencing by ruling that "while the act of transportation was a single one, the unlawful purpose must of necessity have been selective and personal as to each of the women involved . . . . We therefore believed that two separate offenses were committed in this case." Bell v. United States 213 F2d 329, 630 (CA 3, 1954). The Supreme Court disagreed. The Court ruled that "If Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses when we have no more to go on than the present case furnishes." Bell supra 349 US at 84.

In the Ladner case the Supreme Court reversed judgment which, upon convictions for assault with a deadly weapon on two

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15/ Bell v. US 349 US 81 (1955); Ladner v. US 358 US 169 (1958)

Federal officers, imposed consecutive sentences of 10 years imprisonment as the maximum penalty on each conviction of assault. After determining that it could not find "that Congress intended that a single act of assault affecting two officers constitutes two offenses under the statute," the Court concluded that a judicial policy of lenity should apply and stated:

> "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that intent clear. We thus hold that the single discharge of a shotgun alleged by the petitioner in this case would constitute only a single violation under § 254." Ladner, supra, 358 US at 178.

Particularly relevant to the instant case was the Court's analysis of the incongruousness of the results in terms of excessive penalties, that would result from consecutive sentencing according to the number of objects affected by a single act of criminal conduct.

> "Moreover, an interpretation that there are as many assaults comitted as there are officers affected would produce incongruous results. Punishments totally disproportionate to the act of assault could be imposed because it will often be the case that the number of officers affected will have little bearing upon the seriousness of the criminal act. For an assault is ordinarily held to be committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm. Thus under the meaning for which the Government contends,

> one who shoots and seriously wounds an officer would commit one offense punishable by 10 years' imprisonment, but if he points a gun at five officers, putting all of them in apprehension of harm, he would commit five offenses punishable by 50 years' imprisonment, even though he does not fire the gun and no officer actually suffers injury. It is difficult, without a clearer indication than the materials before us provide, to find that Congress intended this result."
> Ladner, supra, 358 US at 177

In light of the foregoing precedent, it was error for the District Court to use convictions of appellant on three counts of assault with a dangerous weapon, each charging the same offense but naming a different person in a case where all three persons named were subject in common to the same act of assault (through threatened violence) incident to a robbery of store property only.

2. Appellants were Seriously Prejudiced by the Exclusion of Evidence Proffered by the Defense for Impeachment of the Testimony of Police Witnesses for Bias and Hostility as Evidenced by the Physical Beating Inflicted by Such Witnesses on Appellants

(With respect to Point 2, appellant desires the court to read the following pages of the reporter's transcript: Tr. 474-493, 549-553, 573-589, 592-593, 302-305, 318-328, 383-398, 823-829 inclusive.)

In the course of the direct examination of the co-appellant Blair, his counsel at the bench conference stated his intention to elicit testimony from his client concerning a physical beating suffered by him at the hands of police officers at the precinct to which he had been

taken after arrest. Tr. 474 et. seq. As discussed in the companion brief of the co-appellant, the trial court, after briefly hearing only co-defendant Blair on the subject of police brutality, refused to permit any evidence on the subject to be developed for either co-defendant (Tr. 489). At the opening of the trial the following day, before the jury was admitted, the trial court informed defense counsel (Tr. 492) that he had reconsidered (Tr. 493) and that he would hear this evidence out of the presence of the jury.

During this hearing Appellant Suggs testified to having been the object of kickings and verbal racial slurs by the two police officers who arrested him. Tr. 549-51, 572, 573, 578. Appellant's brother, Charles, was called and testified that he was present at the outset of his brother's arrest. He testified further that before he was ordered to leave the scene of the arrest by the arresting officer, he witnessed a kicking of his brother by the officer who first arrested him. Tr. 305, 319-21, 325. Appellant also testified to being beaten for a few minutes (Tr. 583) about the body and legs (Tr. 553-4, 584) by two other police officers[13/] soon after arrival at Police Headquarters when he refused to admit participation in the robbery. Tr. 552-3, 583-4. U. S. Commissioner Wertleb was called and verified that at the hearing before him eight days after the arrest he noted a bruise on the left leg which

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13/ According to this testimony, one of these officers was emotionally disturbed by virtue of his physical presence at the fatal wounding of a brother officer by the robber who later committed suicide. Tr. 552, 584.

appellant exhibited as evidence of a police beating. Tr. 595-3, (confirmed at Tr. 200, 334 by the arresting officers). At the hearing before the court below appellant exhibited a scar on his left shinbone. Tr. 554-5.

After devoting the day to hearing testimony and allowing brief argument by counsel, the trial court stated its ruling on the record granting the prosecutor's objection to impeachment testimony (Tr. 393) so as to exclude any and all reference before the jury to the beatings suffered by the co-appellants at the hands of the police. Tr. 393-7. Over the objection of defense counsel (Tr. 825), the exclusion was extended by the trial court even to any reference before the jury of the ruling made by the court on that subject. Tr. 397-8, 823-5. The court further admonished counsel that if any mention of the prohibited references was made by the defendants, they would suffer the consequences which could include commitment. Tr. 828-9. In stating its ruling (Tr. 391-3), the trial court held that testimony of alleged brutality against defendants by police officers who previously testified was irrelevant even for impeachment purposes. This is contrary to the express ruling of this court that such evidence is "always relevant." Villaroman v. United States, 87 App. DC 240, 184 F 2d 231, 21 ALR 2d 1074 (DC Cir. 1950).[17/]

17/ Cited by the Court were 3 Wigmore, Evidence § 948 et. seq. (3rd Ed. 1940). See also Greatredks v. U.S., 211 F 2d 574, 573 (CA 9, 1954) in which the Court, citing the same authority, said, "The propriety of showing the bias of a witness not only by cross-examination but by extrinsic testimony of other witnesses is well settled." The Greatredks case was cited as authority in the Wynn decision infra.

In support of this total exclusion, the trial court held that the evidence in question would "introduce a racial issue into this case" (Tr. 392) "with the inflammatory and sensational effect it may have on this jury" (Tr. 391) of "twelve intelligent negroes." Tr. 394. The trial court further stated that "this Court has never permitted any allegations of police malfeasance or brutality motivated by racial considerations and no exception is going to be made in this case." Tr. 392. Such a statement disclosed a closed mind attitude which would be wholly incompatible with judicious evaluation and a fair hearing on the evidence presented. Since this arbitrary attitude alone was sufficient ground to explain the ruling, it would be difficult to credit any of the other stated grounds for the ruling as being anything more than window dressing. In its further grounds for ruling, however, the trial court misconstrued its discretionary power to limit the scope of evidence introduced to impeach government witnesses for bias and hostility as a power to exclude any and all reference thereto on the basis of the court's own determination of the facts. In doing so, the trial court erred by removing from the jury its proper jurisdiction to determine the facts on brutality, particularly since evaluation and determination of the credibility of witnesses was inescapable to a resolution of the diametrically opposed conflict in the testimony. The bruise exhibited by appellant Suggs and verified by the U. S. Commissioner just 8 days after appellant's arrest was sufficient objective evidence alone to require, along with the corroboration afforded by appellant's brother, that the issue of fact be submitted

to the jury.

The trial court's ruling was moreover incompatible with the rules restated by this court most recently in the Wynn case. (Wynn v. United States, No. 20723, decided November 16, 1967).

> "A party's right to undertake demonstration of the bias of his adversary's witness coexists on the same plane with the adversary's prerogative to use the witness. Such an effort may properly solicit over a wide range any information of potential value to the trier of fact in assessment of credibility . . . the admissibility of extrinsic testimony to establish the event [suggesting hostility] seems unquestioned. The trial judge, of course, retains control over the testimonial scope, but a judicial discretion soundly exercised contemplates that there will be ample latitude for pertinent inquiry. . . . In our view, the effect of the exclusionary ruling was to cut short a legitimate defensive endeavor." Slip. Op. pp. 3-5 (emphasis supplied) (footnote references deleted)

This court then noted that to constitute ground for reversal such exclusionary ruling must operate detrimentally to appellant. In the Wynn case, as in the case at bar, the defendant presented an alibi defense which was incompatible with the government's version of the arrest which rested entirely on the testimony of the two arresting police officers and the confusing testimony of Mrs. LaNoir, a resident near the scene of arrest.

> "With credibility so vital to resolution of the issue their diametrically opposed versions generated, we think the probability of injury is so grave that appellant must be afforded a new trial." Wynn, supra, Slip Op. p. 5.

Since credibility in the case at bar was no less vital than in the Wynn case, it was reversible error for the trial court to withhold from the jury all evidence of police brutality and hostility, and to foreclose the "legitimate defense endeavor" of impeaching the credibility of the arresting officers by such evidence.[18/] Wynn supra Slip Op. p. 5

18/ It may be noted that the trial court's ruling in the case at bar maintained that the exclusion was necessary to protect the defendants from allowing evidence prejudicial to them to go to the jury by way of government rebuttal. Tr. 694-5. In the Wynn case, this court responding to a similar contention held that "it was appellant's prerogative to risk the accompanying reference to another crime." Slip Op. p. 5

3. The Trial Court Erred in Allowing, for Impeachment of Appellant's Only Defense, Unrestricted Use by the Prosecution of Inadmissible In-Custody Statements Given by Appellant During Police Interrogation.

(With respect to Point 3, appellant desires the court to read the following pages of the reporter's transcript: Tr. 336-346, 552-557, 578-589, 1004-1009, 1046-1077, 1110-1111, 1123-1128, 1214-1242.)

Enforcement of the Congressional policy of prompt presentment before a commissioner without "unnecessary delay" (FR Crim. Proc., Rule 5(a)) has led to the requirement that "statements elicited from defendants during a period of unlawful detention" are inadmissible. Mallory v. United States, 354 US 449 (1957) Appellant, who according to police testimony was caught in hot pursuit, "red-handed," with stolen property, was arrested at about 6:30 p.m., March 23, 1966, and taken to Police Headquarters arriving at about 7:30 p.m. Tr. 338. At 7:55 p.m. (Tr. 1217) a plainclothes police officer started taking notes on appellant's "statement." Tr. 339, 336. He testified that he was with appellant "a good hour and a half" (Tr. 341) and about 10:30 p.m. took appellant for fingerprinting.[19/] Tr. 339, 361, 686. By some paradox unexplained on the record, the interrogating officer, who was preparing the police activity sheet PD 163-A - received in evidence as Govt. Ex. 14 (Tr. 339, 369) - was not assigned to investigate the crime. Tr. 347.

19/ Another police officer present, testified that he first observed appellant at 8:30 p.m. (one hour after appellant's arrival at Police Headquarters) in the Homicide Squad office with one plainclothes and one uniformed police officer and that appellant remained there except for one brief period until 10:00 p.m. or 10:15 p.m. Tr. 651-2, 660-1. During that time some 10 to 15 police officers were present. Tr. 658. "Quite a few" police were present according to two other police officers including the arresting officer Jacob who remained there the "rest of the night" until 10:30 p.m. Tr. 679, 632, 633.

Nevertheless that officer told appellant that "if he was innocent would he tell me what his activities were that day and I would record them and check out his alibi" (Tr. 344)--also the officer said he "was just trying to gather facts . . . to determine the facts." Tr. 1217[20/] The appellant described this effort as "he wanted me to make a statement concerning I was involved." Tr. 1005. A typed statement was prepared from the officer's notes which appellant refused to sign. Tr. 1242-3. The appellant was not brought before the U.S. Commissioner until the next morning--March 24. (Orig. Record on appeal.) In light of the police version of the arrest, this delay in presentment was unnecessary so that the defendant's statements are inadmissible under the Mallory rule. Spriggs v. U.S. 118 App DC 248,250-1, 335 F 2d 283, 285-6 (DC Cir 1964); Gross v. United States U.S. App DC, No. 20994, decided November 16, 1967.

Inadmissibility of these pre-commitment in-custody statements is likewise established by virtue of the Miranda rule.[21/] The record below is bare of any evidence that defendant was advised of his privilege against self-incrimination, his rights to counsel and to be silent before the questioning without counsel present. On such a record, Miranda, supra, declares the statements given to be inadmissible.[22/]

20/ Despite the stated purpose, the officer conceded that he checked out only part of it (Tr. 345) and that even after checking out some more of appellant's statement during the trial one year later -- (Tr. 1236) there were still a "half dozen or more things" he did not check at all (Tr. 1240). The record is silent as to why such elaborate interrogation was undertaken by the police in view of their version of the arrest which had appellant caught red-handed.

21/ Miranda v. U.S. 384 U.S. 436 (1966)

22/ The trial below March 6-15, 1967, is governed by the Miranda case decided June 13, 1966. Johnson v. U.S. 384 U.S. 719 (1966)

384 U.S. at 492, 494, 498-9. The record noted (Tr. 586, 587) that although appellant requested an attorney (Tr. 553) and was told that appellant Blair's attorney would be there, appellant Suggs was not allowed to see Blair's attorney that night. Tr. 586-7.

Notwithstanding the inadmissibility of these statements, and over the objections of counsel (Tr. 1219) the below ruled that for the purpose of impeaching defendant's credibility, the prosecution could call the interrogating officer in rebuttal to establish that defendant's testimony was contradicted by his in-custody statement. The prejudicial effect of this erroneous ruling on the appellant's defense is so obvious and serious as to require reversal.

The error of the ruling is readily apparent from this court's decision in White v. U.S. [23/] which held that the government's use of "appellant's statement directly to contradict his only defense" required reversal. [24/]

The court said:

> "The fact that appellant's statement might impeach his defense more effectively than the police testimony is no justification for admitting it. A defendant must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal, evidence illegally secured by it, and therefore not available in its case in chief' [citing Walder v. U.S. 347 U.S. at 65]. Inadmissible 'evidence is not rendered admissible merely because the defendant testifies in his own behalf.' [citing Johnson & Stewart v. U.S. 120 App DC 69, 71, 344 F 2d 163, 165 (D.C. Cir. 1964)] White, supra, 121 App DC at 289, 349 F 2d at 967.

23/ 121 App. DC 287, 349 F 2d 965 (DC Cir. 1965)

24/ 121 App. DC at 290, 349 F 2d at 968.

As in the White case in which self-defense was the central issue so it is in the case at bar with defendant's alibi defense, that the use made by the prosecution of the inadmissible statement "bore on the central issue" of the case. Appellant's entire defense rested upon his alibi, which, although precluding his participation in the robbery, placed him at the scene of the successful flight of two of the robbers and resulted in his illegal arrest. The version of the facts given by two motorcycle police officers who made the arrest was irreconcilable with the appellant's version. A direct, unavoidable, and crucial credibility issue was therefore created for the jury between the appellant's testimony and two witnesses with direct corroboration on the one hand and the two motorcycle policemen on the other.

Under the trial court's ruling, the prosecution, after undertaking to lay a foundation by means of cross-examination of the defendant was permitted, over objection by appellant's trial counsel, to introduce by the testimony of the interrogating officer what would appear from the record to have been the entire inadmissible statement. From the rebuttal witness the jury was given a virtual line-by-line version of defendant's pre-arrest activity derived from the illegal interrogation which version conflicted in most major critical areas of comparison with the defendant's testimony at trial as to the facts on which his alibi defense rested. The inevitable consequence of such improper use of the inadmissible statements for impeachment was to make possible critical impairment and prejudice to defendant's credibility before the jury on

which his entire defense[25] rested, because as already noted if the jury disbelieved the defendant and believed the police version, the defendant's case was lost.

It can be seen, therefore, that the use made by the prosecution of defendant's in-custody statement was not limited to the narrow exceptions authorized to the general proscription of the Weeks case[26] against any use of inadmissible evidence of testimonial character by the accused. Certainly the use against appellant of the inadmissible in-custody statement was not confined to limited impeachment of perjurious claims beyond and unrelated to the charge in the case being tried, Walder v. U.S. 347 U.S. 62 (1954) nor was it confined to "purely collateral matters" not bearing on a central or critical issue in the case. Tate v. U.S. 109 App. D.C. 13, 16-17, 283 F 2d 377, 380-1 (D.C. Cir. 1960).

Moreover, the improper use of the appellant's in-custody statement was particularly aggravated in the circumstances of the case at bar by virtue of the trial court's refusal to allow the jury to hear evidence and decide the defendant's claim of physical beatings received from the police at the time of arrest and at Police Headquarters when police were seeking defendant's confession to complicity in the robbery. But for this exclusion the jury would have had the opportunity to weigh the influence of force and duress attending the statements given by the co-defendants and their involuntary character. Certainly if the court

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25/ This consequence was found by this court to be grounds for reversal and new trial in Cannady v. U.S. 122 App D.C. 99, 351 F 2d 796 (DC Cir. 1965) in which error was found in admitting inadmissible impeachment testimony against defendant which "undermined his alibi."

26/ Weeks v. United States, 232 U.S. 383 (1913).

was to allow, as it later did, unrestricted use of appellant's inadmissible in-custody statement by the prosecution in rebuttal to impeach the appellant's only defense, it should have allowed the jury to judge the reliability or involuntary character of the unsworn statements to police officers given in the context of defendant's allegations and evidence of physical beating in a case in which the defendant was arrested on a charge of felony-murder of a police officer[27/] and interrogated in a room full of tension and police officers.[28/]

In this connection, it is significant to note from the record that the court upheld the objection by counsel for co-defendant Blair and the prosecution abandoned its effort to use an in-custody statement given by Blair to impeach Blair's testimony at the trial on a wholly collateral point of fact, i.e., whether one or another of the occupants of the robbery car was identified by Blair as having let down a car window to speak to Blair. Tr. 855-859. The court refused to allow the prosecution to make such use of the Blair in-custody statement because it would open up a line of testimony by Blair of police beatings attending the police interrogation all reference to which the trial court had vigorously excluded by the court's ruling on the record (Tr. 691-697) and stern admonition to defendants. Tr. 697,/ 829. See Argument, Point 2, supra.

The trial court's ruling allowing unrestricted use of appellant's inadmissible in-custody statements for impeachment of appellant's only

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27/ The police officer was killed in a gun battle with one of the robbers, who committed suicide. These events took place after appellant's arrest in a location unrelated to the gun fight.

28/ See fn. 19 supra.

defense to the charge, i.e., alibi, was wholly erroneous and prejudicial and requires reversal.

4. The Trial Court Erred in Failing to Instruct the Jury on Asportation as an Essential Element of the Charged Crime of Robbery.

(With respect to Point 4, appellant desires the court to read the following pages of the reporter's transcript: Tr. 1283-1286 inclusive.)

Under the holding of the Byrd case,[29/] the trial judge must instruct the jury as to every essential element of the crimes charged. This requirement applies even if no issue or dispute existed at the trial regarding the element in question so that the trial judge could have taken the uncontested issues from the jury. The failure to instruct as to an essential element of the crime charged is, therefore, plain error under Rule 52(b) of the Federal Rules of Criminal Procedure requiring reversal and new trial under the Byrd case holding.

In the case at bar, the trial judge neglected (Tr. 1284-6) to give any instruction to the jury on asportation which is one of the essential elements of robbery.[30/] The trial judge also omitted from his

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29/ Byrd v. United States, 119 App. D.C. 360, 342 F 2d 939 (D.C. Cir. 1965). Also Jackson v. United States, 121 App. D.C. 160, 348 F 2d 772 (D.C. Cir. 1965); Liles v. United States, U.S. App. D.C. Cir., Case No. 20807, decided November 16, 1967 (Slip Op. at p. 2).

30/ Rutkowski v. United States, 149 F 2d 481 (CA 6, 1945). Also for asportation as element of larceny which in turn is includible as element of robbery, see Lamore v. United States, 78 App. D.C. 12, 136 F 2d 766 (D.C. Cir. 1943); Turner v. United States, 57 App. D.C. 39, 16 F 2d 535 (D.C. Cir. 1926). See also Criminal Jury Instructions (No. 104 pp. 85-7) (Jr. Bar Sec.) D.C. Bar Assn. Handbook (1966)

instruction (Tr. 1284-5) on the taking required as necessary element of the robbery, that it be against the will of the owner or without knowledge or consent of one authorized to consent on "owner's behalf and further that" there have been such a taking that the defendant acquired possession of the property enabling him to exercise actual control of it."[31/]

Under the authority of the cited cases, these omissions from the instructions by the trial judge to the jury on the elements of the robbery charged were clear error requiring reversal.

31/ Instruction 104, D.C. Bar Ass'n Handbook, supra.

5. The Trial Court Erred in Allowing the Prosecution to Discredit Appellant or His Defense Before the Jury by Prosecution Statements Unsupported by the Record and by Improper and Prejudicial Interrogation

(With respect to Point 5 appellant desires the court to read the following pages of the reporter's transcript: Tr. 551, 576, 597-599, 605, 610, 612, 612A, 834-835, 944, 954-955, 962-964, 982, 987, 1004, 1054-1056, 1069-1077, 1113-1122, 1125-1127, 1146-1154, 1211-1213.)

A major area of undue prejudice to the appellant resulted from improper impeachment by the prosecution of appellant and his brother, Charles Suggs, a major witness in support of appellant's alibi defense. Since the credibility before the jury of appellant and his supporting witnesses were crucial to his defense in view of the direct conflict in the appellant's and the government's version of the facts attending appellant's arrest, any unfairness or impropriety in the prosecution's impeachment efforts would in this context be a fatal error requiring reversal. The form of the objectionable impeachment was evidenced in three ways: 1) by the suggestion of testimonial evasiveness by appellant implied from his inability or unwillingness to give "yes" or "no" answers to complex multi-factual questions on cross-examination, 2) by creation of issues of self-contradiction asserted against appellant and his brother, which assetions were not borne out by the record facts, and 3) by misstatements of the evidence in the prosecutor's closing argument.

In a leading case, the U.S. Supreme Court has held that the cause of an accused is to be protected from influences on the jury from unjustifiable cross-examination or statements of the prosecution not substantiated or justified by the record evidence. Berger v. United States, 295 US 78, 84 (1935).[32/] The record in the case at bar (Tr. 834-5) reflects a level of tension and emotional involvement by counsel during the trial which would go far to explain the probable inadvertence of counsel in presenting the objectionable and prejudicial matter to be discussed hereafter. Whether inadvertent or not, the prejudice suffered by the appellant before the jury is no less real, whatever the explanation, in a case such as the one at bar, in which the outcome of appellant's trial was crucially dependent upon the jury's resolution of the sharply drawn credibility issue presented to them between the conflicting versions of the defendant and the government as to the appellant's arrest.

The first of the three objectionable forms of prejudice to appellant, i.e., the multi-factual question, is best illustrated by the second instance[33/] of its use against appellant. Tr. 1069, line 9;

32/ Reversible error arising from prejudicial statements by the prosecution was considered by this court in Stewart v. U.S., 100 App DC 51, 247 F2d 43, 44 et seq. (DC Cir 1957) (statement by prosecutor in argument to jury indicating personal knowledge of perjury by a defense witness) See also cited authorities and discussion in Wallace v. U.S., 281 F2d 656, 664 et seq. (CA 4, 1960).

33/ The first instance at Tr. 1054 was objected to after appellant expressed difficulty in answering the multi-factual question "yes" or "no". When appellant answered that question in the form demanded by the court, appellant's negative answer was immediately questioned by the court forcing appellant into the position of having to explain his denial. Tr. 1056.

1070, line 17. When the prosecutor stated before the jury that appellant's explanatory answer to a question embracing at least eight factual elements was not a responsive answer to that question, the prosecutor proceeded to repeat the question in enlarged form so that it contained at least 10 factual elements. Appellant's answer "some of your [10 part question] is true. . ." was then cut off by this judicial admonition before the jury.

> "Wait a minute, Mr. Suggs, counsel has asked you a question and the jury is entitled to know what your answer is. If you don't understand the question you may turn to me and say, Your Honor, I don't understand the question. But they are entitled to know what your answer is and it is up to the jury to make up their mind and as to credibility and weight to give your answer." Tr. 1069-70

By this admonition the appellant was put in the impossible position before the jury either of having to answer these complicated multi-factual questions--"yes" or "no" or of being allowed to explain only if he then told the judge he could not understand the question. Since the difficulty posed by these questions arose from their combination of multiple factual elements and not from any lack of understanding of word meanings, appellant could not reasonably claim that the question could not be understood--a judicially imposed precondition to being allowed to make an explanation.[34/] The risk to appellant of

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34/ Although in the interrogation in question the court allowed appellant to offer an explanation (Tr. 1070) to his simple "yes" answer without preliminarily requiring a statement of lack of understanding, the instruction could not have helped but to complicate and confuse appellant in coping with the prosecutor's subsequent continuation of multi-factual questions.

his failure to follow this precise designated procedure would be that the jury might give him a low mark on the "credibility and weight" to be given to the answer, as the judge had just advised the jury. With this favorable ruling, the prosecution continued throughout that line of questioning the use of multi-factual questions (Tr. 1071-7; 1125-7) and of criticism of the appellant suggesting evasiveness for failure to give "yes" or "no" answers. Tr. 1071, line 8; 1073-4 (joined in by the court)

The second form of improper and prejudicial interrogation technique allowed by the trial court, involved instances in which the prosecution attacked the testimony of either appellant or his brother by confronting them with alleged and usually non-existent self-contradictions of earlier testimony given out of the presence of the jury. Objection of defense counsel to the first such instance was overruled by the trial judge Tr. 955. In this instance the prosecutor asked the witness, Charles Suggs, before the jury if, when the witness said he got home "somewhere around 3:30" (Tr. 954), the witness had not contradicted his testimony given out of the jury's presence the day before, that he had "got home around 3:30 or 3:45." To this challenge, the witness answered he did not think so. The trial transcript shows that on the previous day when testifying out of the presence of the jury (Tr. 395) the witness initially testified on direct to getting home "somewhere around 3:30 or quarter to four" (Tr. 597) which, however, he qualified on the very next question and answer by saying that he got

home "somewhere around 3:30" (Tr. 598) On cross-examination shortly after, the witness repeated that he said he got home "somewhere around 3:30" Tr. 605. This last answer was what the witness said when he appeared before the jury (Tr. 954)so that no self-contradiction was involved.

On the next instance of the prosecution's use of this form of interrogation, defense counsel again objected to the taking of the witness' testimony out of context. The court, without sustaining the defense's objection, advised the jury that "the evidence is what comes out of the witness's mouth and is up to the jury to say whether or not they believe the testimony" Tr. 953. This observation by the court, favorable to the prosecution, neglected to inform the jury that the prosecutor over defense objection was attempting impeachment of the defense witness by use of prior testimony given by the witness out of the presence of the jury. Consequently, the jury had no way of determining whether or not the prosecutor's recollection of the testimony was accurate or inaccurate. In such circumstances they would probably assume that the prosecutor was accurate in his recollection and conclude that the witness was impeached by the self-contradiction indicated by the prosecutor. Other examples of this procedure for unfairly discrediting the witness are found in the following:

1) The prosecutor confronted the witness with allegedly stating in previous day's testimony out of presence of the jury that he was "unfamiliar with area" (Tr. 932) whereas, the transcript

(Tr. 310) showed that the witness actually testified to being at the Rudolph playground for the first time.

2) The prosecutor then confronted the witness with an allegedly inconsistent statement that witness had earlier in his testimony before jury said that he "had been at that area 3 or 4 times." Tr. 962. The court ignored defense objection to this taking of the testimony out of context Tr. 963. The transcript showed that the objection was well taken since the reference to 3 or 4 times was in reference to his previous visits to Mrs. Green's. Tr. 944 Defense counsel's effort on redirect to clarify this point on the record was erroneously rejected by the court as cumulative. Tr. 987

3) The prosecutor confronted the witness with the statement that the witness on the previous day out of presence of the jury had testified that they played some games or shot a few baskets but not both (Tr. 964) whereas, the transcript showed that his testimony had been that they shot a few baskets and played a little ball Tr. 599

4) The prosecutor confronted the witness with his failure to have mentioned in prior testimony out of presence of jury, appellant's meeting with Mrs. Turner prior to and near the scene of arrest (Tr. 982). The witness answered correctly that no one had asked him about meeting anyone, which is confirmed by reference to the record. Tr. 512, 312A

In the case of appellant's testimony given in his own defense, two major confrontations to impeach his credibility on the basis of

alleged self-contradictions were presented by the prosecution. In the first, the court allowed and was sympathetic to the prosecution's efforts to impeach appellant for a response made during direct examination which created an issue of self-contradiction which was wholly unfounded since the full context of appellant's prior testimony failed to show the alleged inconsistency. Thus, on direct examination, the record showed the following interrogation of appellant

> "Q Now, after you were arrested did there come a time you were taken to Police Headquarters? Where were you taken from the scene?
>
> A I was taken to No. 10.
>
> Q How long did you stay there?
>
> A An hour at the most." Tr. 1004, lines 9-14 inclusive

When cross-examined, appellant described the brevity of his stay at No. 10 as involving "a matter of minutes." Tr. 1113[35/] Notwithstanding the clear and repeated testimony referred to in the footnote below, which was known to the prosecution but not to the jury, the prosecution seized upon the appellant's response at Tr. 1113 as

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35/ This was fully consistent with earlier repeated testimony given by appellant out of the presence of the jury that his stay at No. 10 precinct was very brief--"about a minute" (line 10); "minute or two" (line 21) Tr. 551. On cross-examination that same day, the prosecutor obtained further confirmation from appellant that his stay at No. 10 precinct was very brief--"about five minutes" Tr. 576.

a contradiction of what the prosecution gratuitously characterized as appellant's above-quoted testimony on direct (at Tr. 1004) that the appellant was at No. 10 precinct at most an hour. This seeming discrepancy was then made the subject of a persistent and prolonged effort by the prosecutor to discredit the appellant Tr. 1113-1122. Appellant's efforts to explain were cut off by the court with the statement that defense counsel could present by way of redireet any explanation by appellant of the inconsistency being pressed by the prosecution. The trial court then underscored the prosecution's effort by reminding the jury that there was raised an issue of credibility of the appellant as a witness. Tr. 1122 This reminder referred to a long instruction (Tr. 1114-7) which the court had given to the jury at the beginning of this line of attack by the prosecution. The instruction advised the jury of the nature and function of impeachment as it could affect appellant's credibility. Tr. 1118 Defense counsel objected to interjection of the instruction at that critical moment as lending undue emphasis to the prosecutor's developing cross-examination thereby unduly prejudicing appellant's credibility before the jury. Tr. 1117 Later on redirect the same day, defense counsel brought out that appellant's quoted response on direct at Tr. 1004, which the prosecutor had been allowed to attack as affecting appellant's credibility, had been intended by the witness to refer to the time interval between his arrest and his appearance at Police Headquarters. Tr. 1147 Although

this explanation[36] would enable the jury to conclude that the appellant had possibly been inattentive in answering "an hour at the most" to his trial counsel's question of how long he stayed at No. 10 and had intended by that answer to refer to the time that transpired before being taken to the Police Headquarters, as referred to in the preceding question, the prejudice suffered by the appellant before the jury must have been substantial since the jury was deprived of the benefit of the context of appellant's earlier testimony, see footnote 35 supra given out of their presence in which appellant clearly and repeatedly answered both defense counsel and the prosecutor that he remained only "minutes" at No. 10.

The second self-contradiction asserted against appellant presented to the jury another intense and unfair attack on appellant's credibility. This attack by the prosecutor with the trial court's support was developed from the following interrogation of appellant on redirect:

> "Q Now, did you clear money from this [wig] business?
>
> A Yes, I did. (Tr. 1145, lines 21 and 22)
>
> Q Can you give us an estimation and say the early part of 1963, how much money you had made by that time from wigs?
>
> A I probably made anywhere between $5,000 or $6,000."
> Tr. 1146, lines 1-3 (emphasis supplied)

36/ This was not an after thought but was fully consistent with appellant's attempted explanation during the course of the prosecutor's attack that "there was a prior question asked to me before that." Tr. 1122

The prosecutor's first question on recross was

"Q How much did you say you earned in the early part of 1963 selling wigs?

A I figure maybe five or six thousand, something like that." Tr. 1150

Quite obviously with the questions and answers in mind which he had just previously answered on redirect, appellant repeated the answer he had previously given without apparently realizing that the prosecutor had changed the time period in reference and limited it only to the early part of 1963. As soon as appellant realized that the prosecutor was questioning him only about the early part of 1963, appellant then correctly stated that his answer of $5,000 to $6,000 earnings had reference to the wig business up to early 1963 and not just in early 1963. Tr. 1151 The Court then intervened and repeated the prosecutor's error by asking the witness directly if his answer to defense counsel on redirect had not been that his earnings in the early part of 1963 were 5 to 6 thousand dollars. Tr. 1151 A luncheon recess was then taken after the trial judge ordered the reporter to write up the transcript of record containing the disputed testimony. Ibid. These events would certainly suggest that the court regarded the appellant's answers to be evasive and lacking in candor. After the recess, with the transcript available showing that the earning period had not been limited by defense counsel to the early part of 1963, the prosecution concentrated its attention on the inattentive answer which appellant had given to the prosecutor's first question on recross

(Tr. 1150) that did limit the period to early 1966. When appellant explained that he had misunderstood that question (Tr. 1152) the prosecutor, even in the face of the fact that his own question (Tr. 1150) did not reflect what the record showed appellant had answered on redirect, persisted, until cut off by the trial judge, to disparage and challenge appellant to show the jury what could have been misunderstood about the prosecutor's "simple question" Tr. 1154.

The third instance of unfair discredit to the credibility of testimony crucial to the defense case which was presented to the jury without support in the record evidence is found in the prosecution's closing argument in rebuttal. Defense closing argument for appellant Suggs emphasized to the jury the importance of the testimony of appellant Blair (Tr. 879-80), who was in an admitted position to know that appellant Suggs was not at Lord & Taylor nor in the getaway car in which appellant Blair had ridden. (Tr. 59-B, Closing Arguments, March 14, 1967). In rebuttal the prosecution countered with the following argument:

> "Don't you think, members of the jury, these two, Blair and Suggs, had an opportunity to talk about it are jointly indicted? Don't you think they talked about it? Don't you think that is the reason why he excludes him . . ." Tr. 68-B.

This argument is not only without factual support in the record but it is in fact contrary to those facts of which the prosecution had or should have had knowledge. The record is clear that the co-defendants were separately arrested, separately taken to Police Headquarters and were

separately interrogated there (Tr. 654)--so that no opportunity existed for them to have contact or to confer before appellant Blair gave to the police the unsigned typewritten statement based on his interrogation which was offered by the government for identification as Govt. Ex. 19 Tr. 854-5; Tr. 675. Thus, the government knew from Blair's statement to the police that Blair had specifically denied any participation by appellant Suggs before any opportunity was presented for contact with appellant Suggs.[37] The trial court should have instructed the jury to disregard completely this specific argument of the prosecution as not based on the known facts.

An additional instance of an uncorrected misstatement made by the prosecution in argument to the jury concerned the testimony of a government witness. This instance was seriously prejudicial to the defendant because it suggested to the jury that the testimony of the only eyewitness[38] produced by the government (other than the two arresting officers) fully corroborated, on the points it covered, the testimony

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37/ The trial court had erroneously sustained an earlier prosecution objection which had blocked appellant's counsel from asking the police officer who arrested appellant Blair if in his conversations with Blair at the time of his arrest Blair had told the arresting officer that Suggs was not in the car. Tr. 246

38/ Although other residents of the neighborhood were apparently present and could have observed and corroborated the police version of the appellant's arrest, only one--Mrs. LaNoir--was produced. Tr. 213, 168 She testified only to movements she observed of unidentified persons Tr. 1213.

of the two arresting officers. Transcript, Closing Argument-- Tr. 28-b, 72-b--74-b, 78-b. The prosecutor's misstatements in argument included the following: ". . .she [the witness] saw then the police officer arrest a Negro person who was lying on the ground corroborating Jacob, corroborating Schroeder" (Tr. 28-b). ". . .she said when two colored people went in the alley she saw lying on that ground a person who was arrested by the police officers. . ." (Tr. 74-b) ". . .if you say that for no reason at all Jacob arrested this individual and that this individual Suggs was not lying on the ground behind the garage as Mrs. LaNoir said, a person was lying. . ." Tr. 78-b.

Contrary to these prosecution statements to the jury, the record shows that Mrs. LaNoir's testimony did not corroborate the arresting officers' testimony that appellant was "lying on the ground" when arrested. Although her testimony was confused and obscure in several aspects,[39/] it was clear that her references to a person who laid on the ground did not apply to the person who was arrested but rather to the one that got away. In her own words her testimony was as follows:

> "A. Well, I saw the one man, here is the alley. I saw one man, he jumped over the fence and he went around behind the garage and I saw the other man going up here but I missed seeing where he went and then the other man went around the

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39/ Indeed Mrs. LaNoir's testimony (Tr. 1212-3) which divided the episode she narrated into (1) a chase with escape and (2) a later police reappearance with a person under arrest may be considered compatible with appellant's version of the arrest, i.e., that he was arrested after the police had unsuccessfully chased the two persons who had left the getaway car.

> garage and come all the way over and come over the fence and he went in the other yard and laid down on the ground and then he got up and he looked through the garage to see what was out in the alley, then he run through a house, went in the house--where he went I don't know."
> Tr. 1212

There can be little doubt that if the jury accepted or was influenced in its own recollection by the prosecutor's erroneous restatement of Mrs. LaNoir's testimony, appellant would have been critically prejudiced. Because the jury could have been persuaded to reject appellant's defense by any one or all of these instances of misstatements of the evidence by the prosecution or by the unfair attacks to impeach or discredit appellant or his principal defense witness, the judgment of the District Court should be reversed.

6. The Trial Court Erred in Allowing the Jury to Receive Items of Circumstantial Evidence Against Appellant Unsupported by Sufficient Evidence.

(With respect to Point 6, appellant requests that the court read the following pages of the reporter's transcript: Tr. 185-189, 307-313, 555-556, 580-584, 1138-1146, 1168-1169, 1177-1181, 1230-1232, 1243-1244, inclusive.)

In the trial below, eyewitness testimony presented two mutually exclusive versions of the facts, i.e., the defendant's alibi defense, which explained his presence at the scene of arrest but denied any knowledge or participation in the robbery, and, on the other hand, the government's version as presented by the arresting officer. There was no identification of the appellant by the victims at the scene of the robbery, and, moreover, appellant was specifically excluded from presence or participation in the robbery by the testimony of appellant Blair, who admitted being with the robbers immediately prior to and after the robbery, and with them also in their flight. To eliminate any reasonable doubt from the jury's mind that might be created by this head-on credibility issue and thereby to tilt the scales in its favor, the prosecution offered and relied upon three items of circumstantial evidence, any one of which could well have proven sufficient to decide the credibility issue against appellant. Consequently, if it is shown that the trial court erred in allowing such evidence to go to the jury, the error would clearly be of sufficient prejudice to appellant to require a reversal.[40/]

40/ Cooper v. United States, 94 App. D.C. 343, 218 F 2d 39 (D.C. Cir. 1954).

In the prosecution's opening statement at the trial, no reference was made to the money or the bullet--as two of the three elements of circumstantial evidence in question here--while the third item--the fingerprint--was briefly but ambiguously referred to as "certain fingerprint evidence found in the T-Bird" (Tr. 8a March 6, 1967, Government Opening Statement). Each, however, was introduced at the trial and given emphasis by the prosecution in closing argument.

In the case of the money, the police witness testified that $562 in cash was found upon search of the appellant at Police Headquarters. Tr. 1231-2, 555-6. The appellant testified that the money was his own (Tr. 998) and on the basis of his claim, it was included in the property receipt (Def. Ex. 9-Tr. 1006-7) given to appellant for his belongings in accordance with police procedures. Tr. 313, 346. Later, apparently by merely claiming the money as "fruits of the crime" and without a scintilla of evidence to support that claim beyond its possession by appellant, another police officer obtained the money from the cell block property officer. Tr. 307-9, 311-2. At the trial, over defense counsel's objection, and again without a scintilla of evidence (other than appellant's possession) which would identify the money possessed by appellant with money taken in the robbery, the court admitted the money as evidence against appellant. Tr. 308. Although the police version of appellant's arrest described appellant as in flight from the getaway car in almost continuous sight of the arresting officer, who allegedly found appellant crouched over a bag containing identifiable Lord & Taylor gift certificates and money (Tr. 301, 184), no effort was made by the prosecution to connect the money found on appellant at

Police Headquarters with the money in the bag found in appellant's possession. The prosecution was satisfied and the court concurred in the view that any money recovered from the appellant's person could from that fact alone be properly considered to be fruits of the crime. Tr. 308. This was clearly insufficient, particularly in the face of appellant's evidence that he could generally account for the money from his earnings in active and gainful self-employment in selling wigs. Def. Exs. 10, 11; Tr. 1138-1146. The wigs were obtained from a source in Richmond, which was verified even by the police. Tr. 1236. Though there was active cross-examination to challenge appellant's testimony and evidence, no rebuttal evidence was offered by the prosecution to disprove appellant's claimed self-employment. In these circumstances, any connection of the money found on the appellant with the money taken in the robbery could be made by the jury not on any factual evidentiary link, but solely on the jury's willingness to speculate that any money found on a person accused of robbery must, by that fact alone, be considered a part of the illegal loot.[41/] It was prejudicial and reversible error for the trial court to overrule defense objections so as to allow the jury to indulge in such speculations.

In the case of the bullet, a reasonable doubt on this piece of circumstantial evidence presented by the government was inescapable so that the bullet evidence should have been withheld from the jury on the ground of fatal insufficiency.

41/ "...the judge must not allow the jury to speculate guilt without evidence or to stray into pure surmise...." Cooper v. United States, supra; 94 App. D.C. at 345, 218 F 2d at 41.

A bullet was admitted in evidence which two police witnesses testified was taken from appellant's pocket on search of his person at Police Headquarters following the arrest. As shown by the statement of case, supra, conflict developed in the testimony of these two police officers--the arresting officer and the interrogating officer--as to which one actually recovered the bullet from appellant's person. Though appellant acknowledged that during search of his person the police produced a bullet which they claimed came from appellant's pocket, appellant denied any knowledge of, or possession of, such a bullet. At the trial, an FBI ballistics expert gave testimony (Tr. 59) which was intended to establish that the bullet in question had been loaded into and ejected without being fired from the chamber of the pistol, which the police testified was found on the ground where appellant was arrested.[42/] Tr. 185-6. The pistol, when recovered, was described as containing a clip with 6 cartridges (Ibid.), giving rise, in the context of other events attending the episode, to a natural inference that the pistol, when recovered, was loaded, i. e., had a bullet in the firing chamber. Such a natural and reasonable inference would, however, be incompatible with the government's case, which would reasonably depend upon recovery of a pistol that was unloaded, i. e., lacking any bullet in the firing chamber. That the government's case would more reasonably depend on recovery of an unloaded pistol follows for two reasons: (1) it would most readily explain and be consistent

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42/ There was no evidence of any fingerprint on the weapon nor any other identification of that weapon with appellant.

with the appearance of the unfired ejected bullet on appellant's person, and (2) a loaded pistol, to be at all usable for ballistics testing, would require ejection and put the police in the possession of a second unfired bullet from that weapon--an unlikely speculation since no evidence of police possession of a second unfired ejected bullet appeared in the testimony at the trial.

Nevertheless, although the government had possession and full control of the recovered pistol and of all its bullets, from and after the arrest, and could readily have removed this latent ambiguity and reasonable doubt by evidence as to whether or not the pistol was actually loaded at the time of arrest, the record is completely and ominously silent on this important fact. The reasonable doubt based on the natural inference that an armed robber, arrested in hot pursuit, would have a loaded weapon was therefore not overcome. Instead, the jury was left to speculate, without proof of the fact necessary to exclude the reasonable doubt that would exist, even if the evidence were taken in its most favorable light to the prosecution. The insufficiency of the factual evidence concerning the condition of the weapon as being loaded or unloaded at the time of recovery required that such evidence be withheld from the jury. The trial court's failure to withhold such evidence was seriously prejudicial to the appellant and requires reversal of the judgment entered by the court below.

The fingerprint evidence against appellant was likewise too inconclusive and insufficient to have been allowed to go to the jury as probative evidence in support of a conviction. The fingerprint in question was a single print of a right middle finger (Tr. 352) which appeared

upside down on an unidentified page of a March 23, 1966 (the day of the crime) more than 80-page issue of the Washington Daily News. The first and only testimony regarding the existence of the newspaper from which the single upside-down fingerprint was later lifted was that of the police fingerprint expert, Officer Puckett, and of Officer King--the latter being the police officer whom appellant testified had beaten him at Police Headquarters, as well as the one who had signed the complaint against appellants (Original Record) and who was also present and saw Officer Puckett remove the newspaper from the getaway car, which was then reposing in the "cage"--an impound area at Police Headquarters. Tr. 1243-4, 1168-9, 552, 580-4.

In contrast to this testimony, no mention was made of the existence of any newspaper by any of the police officers who observed the contents of the getaway car while it was at the scene of the arrests.[43/] Even more significantly, the prosecution presented no evidence concerning the accessibility or non-accessibility of the getaway car to particular police officers or others from the time it was stopped, until Officer Puckett, the fingerprint expert, found the newspaper on the floor

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43/ Officer Ronald F. Day--Tr. 150-1; Officer Calvin J. Wilson--Tr. 165-7. That all possible evidence at the scene of arrest was being collected and noted is evident from the other officers who testified to recovery, variously, of a pillowcase containing stolen property (Tr. 266), of a ski mask (Tr. 270), of gloves (Tr. 279, 287), of revolvers (Tr. 280, 282), spent shells (Tr. 282). Though the getaway car was not specifically mentioned, a third officer, Officer Coppage, stationed himself at 5th and Hamilton--a matter of only several feet from the car--and later inspected "all around the premises" where the car had stopped. Tr. 294. Yet none referred to the newspaper.

of the car, sometime after 8:00 p.m.[44/] The defense pointed out the serious doubts arising from the lack of evidence (1) as to the persons who searched or had access to the car from the time it left the scene of arrest until Officer Puckett said he found the newspaper in the cage, and (2) as to why a newspaper would be left in the car after it had been searched at the scene of arrest (Closing Arg. March 14, 1967--Tr. 53-b, 54-b). But the prosecutor, who quaintly described the getaway car as having "wended its way to police headquarters" (Closing Arg. Tr. 13-b), derided such an argument, by arguing in reply that defense counsel's argument made no difference. Tr. 70-b-71-b. He further argued, but without record evidence to support him, that "good officers" would leave the newspaper for prints even though the metal box left in the car would need to be removed "because maybe somebody would come along on the street and take it." Tr. 71-b. This, however, would not explain why no one remembered even seeing the newspaper in the car at the scene of arrest.

Moreover, appellant Blair, the only person who testified and admitted being in the getaway car both before and after the robbery, denied on cross-examination that he saw any newspaper in the car. Tr. 870. As relevant to appellant's theory that during the period of questioning, etc. at Police Headquarters. he might have touched and

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44/ Though lying on the floor of the car in front of the front passenger seat, it was described as "all in one piece" (Tr. 1170)--apparently intact and undisturbed by the comings and goings of a major robbery and of flight from police pursuit.

left a print on a newspaper lying around. (Tr. 567, 1012-14, 1127-8), it was conceded by the officer who interrogated appellant that it is the "practice" for police officers in that office to buy and bring up a sandwich and cup of coffee or newspaper, and that the Daily News is available in the building at various self-serving stands. Tr. 1241-2.

To protect the appellant's right to a jury verdict, which can be based on probative circumstantial evidence, it was the duty of the prosecutor to present evidence identifying all persons having access to the getaway car between the time it left the scene of arrest (when the available evidence would indicate no newspaper in the car) until after 8:00 p. m. at Police Headquarters, when Officer Puckett found the newspaper "all in one piece" on the floor of the car. The getaway car was presumably under exclusive control of the police during that entire time, so that the missing evidence could only have been produced by the prosecutor. Without such evidence, the jury was without evidence, direct or circumstantial, to explain the appearance after 8:00 p. m. at Headquarters of a newspaper conspicuous not only by its absence at the scene of arrest, despite evidence of intensive searching there, but also one, the existence of which, was denied by the only available occupant of the car prior to the arrest. In these circumstances, the jury could only apply conjecture and speculation, and not fact, to explain the later appearance of the newspaper.

In the context of these facts, therefore, the evidence was so inconclusive that under the authority of the Borum case[45/] it should not

45/ Borum v. United States, --App. D. C. --, 380 F 2d 595 (D. C. Cir. 1967).

have been submitted to the jury. 380 F 2d at 597. Hiet v. United States, 124 App. D.C. 313, 365 F 2d 504 (D.C. Cir. 1966).

It was error, moreover, for the trial judge to allow the fingerprint evidence to go to the jury over the objection of defense counsel, in view of the failure of the prosecution to afford adequate opportunity before trial for inspection of fingerprint evidence by the defense as ordered by the court below on pretrial motion. Tr. 1183. In a hearing on September 16, 1966 before Chief Judge McGuire, appellant's counsel presented, and the court granted, a motion for leave to inspect Government Exhibits under Rule 16, including any "fingerprints taken from the scene of the crime". Motion Hrg. Tr. 2. In responding to this request, the existence of any fingerprint evidence was in some doubt after the prosecutor said, "Now, if there are fingerprints, I don't know, taken here. He should look at them--" Motion Hrg. Tr. 3, also Tr. 7.

During a bench conference at the trial, defense counsel made known to the trial judge the unsuccessful efforts of defense counsel (Tr. 1177, 1180-1) to obtain access to fingerprint evidence from the prosecution as ordered by the court in September 1966. The prosecutor stated that due to press of courtroom work he may not have been available when contacted by defense counsel, but that he never refused access. Nevertheless, the unavailability of this evidence to defense counsel prior to trial interfered with counsel's purpose in requesting permission to examine the evidence, i.e., to have the fingerprint evidence examined by an independent expert. Tr. 1181. The judge foreclosed development of further evidence or objection along this line by

ruling that defense counsel had had ample opportunity to examine the fingerprint evidence. Tr. 1183. Under all these circumstances, it was error for the court to allow the fingerprint evidence to go to the jury, not only because the evidence was inconclusive, but because defense counsel was not afforded sufficient opportunity to perfect the appellant's defense in meeting this evidence. See Levin v. Clark, U.S.App. D.C., No. 20682, decided November 15, 1967, Slip Op. pp. 2-5.

7. Appellants were Deprived of a Fair Trial and Effective Assistance of Counsel by the Trial Judge's Criticism of the Appellants and their Counsel, and by the Trial Judge's Undue Intervention in the Proceeding.

(With respect to Point 7, and supplementing the transcript page references requested by appellant Blair, appellant Suggs requests that the court read the following additional pages of reporter's transcript: Tr. 80, 216-221, 568-571, 828-829, 834-835, 886-888, 987-988, 1007-1008, 1015, 1026-1027, 1029, 1036-1038, 1041-1045, 1091-1093, 1114-1118, 1122.)

This point of error is common to both appellants Blair and Suggs, who were co-defendants in the same trial proceedings that are here on appeal. Since the contention has been presented and argued in the brief of appellant Blair in companion case No. 21033, appellant Suggs joins in and adopts Point 1 of appellant Blair's brief that presents

this error. 46/ This, however, is supplemented herein by additional citations to the transcript of record, reflecting actions of the trial court having prejudicial effect with particular reference to the defense of appellant Suggs.

The significance of some of the supplementary transcript references will be discussed briefly. In relation to trial counsel, the court at Tr. 218 disparaged defense counsel's line of questioning in what was identified as part of the defense case (Tr. 217) and charged that diversionary issues were being injected because counsel had no real defense. Tr. 218-9. At another point, the court's comments curtailed proper redirect (Tr. 987-8, see Point 5 supra), and unnecessarily refused defense requests that a defense exhibit be passed to the jury for inspection. Tr. 1007-8.

At a bench conference, the court directed the prosecutor to develop cross-examination on the appellant's wig business (Tr. 1026-8) which the prosecutor did. After which the court personally interrogated the witness on the same subject before the jury and concluded by informing defense counsel before the jury that over the weekend the defense "think... and get the names or have these people [appellant's wig customers] here if you can." Tr. 1036-8, 1045. Though made as

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46/ Appendix to the Blair brief includes the affidavit of Mrs. Dovey J. Roundtree, trial counsel for appellant Suggs, in which she verifies the atmosphere in which the trial was conducted and its adverse effect. The Docket in the case at bar will note the further statement to this court of Mrs. Dovey J. Roundtree regarding the "prejudicial conduct of the Court in. . . general demeanor of the Court which created a hostile and volatile atmosphere throughout trial." P. 2, May 1967 Application for Bail Pending Appeal, filed by Mrs. Roundtree.

a suggestion, the court's statement would unavoidably interfere with the control by defense counsel over the case to be presented, since the jury could reasonably interpret any failure by defense counsel to implement fully the trial court's suggestion as a sign of weakness in the defense case. In relation to defendant, the court's comments during hearing outside presence of the jury suggested to appellant, even before his defense was opened, that the court did not consider him a truthtelling person. Tr. 568, 570. The court, at Tr. 829, threatened commitment if certain references appeared in testimony of defendants or other defense witnesses. The court showed, before the jury, his complete agreement with the prosecution's characterization of defendant's testimony as making a liar out of the government fingerprint witness, Officer Puckett. Tr. 1015. The characterization was unwarranted since the explanation offered by appellant as to how a fingerprint of his might have been placed on the newspaper (Tr. 1013) was not inconsistent nor incompatible with Officer Puckett's finding of the newspaper in the car. The newspaper could have been put there before Officer Puckett examined the car to lift fingerprints.

Over the objection of defense counsel, the trial court at several points unduly emphasized, by comment and a long instruction on credibility, and impeachment, the significance that could be given by the jury to the prosecution's cross-examination of appellant, who was on the stand, facing cross-examination as a witness in his own defense. Tr. 1091-3, 1114-1118, 1122. Though the jury was told that it was their responsibility to resolve issues of credibility, the court's

interruptions to comment and instruct on these efforts of the prosecution to impeach and discredit appellant would unavoidably impress the jury with the fact that they were, at that point, being confronted with particular or special questions of appellant's credibility. This participation by the court in the prosecution's cross-examination was a serious and prejudicial detriment to appellant in a case where credibility was a key question in the success or failure of his defense.

CONCLUSION

For the reasons stated above, it is urged that the judgment of conviction against appellant be reversed.

Respectfully submitted,

Frederick H. Walton, Jr.
Attorney for Appellant

938 Bowen Building
Washington, D. C. 20005

APPENDIX

Text of relevant portions of designated statutes and rules, supra.

DC Code (1967 Ed.) Title 22, Section 502 provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 804.)

DC Code (1967 Ed.) Title 22, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 810.)

DC Code (1967 Ed.) Title 22, Section 3201 provides:

> "Pistol," as used in this chapter, means any firearm with a barrel less than twelve inches in length.
>
> * * *
>
> "Crime of violence," as used in this chapter, means any of the following crimes, or an attempt to commit any of the same, namely: Murder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping, burglary, housebreaking, larceny,any assault with intent to kill, commit rape, or robbery, assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment

in the penitentiary. (July 8, 1932, 47 Stat. 650, ch. 465 § 1.)

DC Code (1967 Ed.) Title 22, Section 3202 provides:

> If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or subsequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years. (July 8, 1932, 47 Stat. 650, ch. 465, § 2.)

DC Code (1967 Ed.) Title 22, Section 3204 provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a

violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 351, ch. 465, § 4; Nov. 4, 1943, 57 Stat. 583, ch. 293; Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, § 204(c).)

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Brief for Appellant" has been mailed, postage prepaid, to the Honorable Frank Q. Nebeker, Assistant United States Attorney, United States Court House, 3rd and Constitution Avenue, N. W., Washington, D. C. 20001, this 2nd day of January, 1968.

Frederick H. Walton, Jr.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,033

CLARENCE BLAIR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,034

JAMES L. SUGGS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
Assistant United States Attorneys.

LARRY D. KNIPPA,
Special Attorney
to the United States Attorney.

Cr. No. 573-66

QUESTIONS PRESENTED

(1) Whether under convictions for one count of robbery of A and three counts of assault with a dangerous weapon of A, B and C arising out of one transaction, consecutive sentences can be imposed for (a) the robbery of A and the assaults of A, B and C, or (b) the robbery of A and the assaults of B and C, or (c) the assaults of A, B and C?

(2) Whether the trial court erred in excluding evidence of bias of the police officers on the basis of alleged police brutality?

(3) Whether the trial court erred in its instructions to the jury, none of which were objected to at trial?

(4) Whether three items of circumstantial evidence were properly admitted?

(5) Whether the trial court properly allowed impeachment of appellant Suggs by use of prior inconsistent statements?

(6) Whether appellants were deprived of a fair trial by the trial judge, defense counsel, or the prosecutor?

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JAMES L. SUGGS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

During March 2, 6-10, and 13-15, 1967, the two appellants were tried by a jury before District Court Judge Sirica under a six-count indictment arising out of the

armed robbery of a department store on March 23, 1966. The first count charged appellants with a violation of 22 D.C. Code § 2901 by robbing Lionel Stewart of about $24,000 in money belonging to the department store. Counts two, three and four charged them with violating 22 D.C. Code § 502 by assaulting Lionel Stewart, Gerald Vaizey, and Allan Nordgren with a dangerous weapon, a pistol. Count five charged appellant Suggs with a violation of 22 D.C. Code § 3204 by carrying a pistol without a license. Count six also charged appellant Blair with carrying a pistol without a license.[1] The jury returned a

---

[1] FIRST COUNT:

On or about March 23, 1966, within the District of Columbia, James L. Suggs and Clarence Blair, by force and violence and against resistance and by putting in fear, stole and took from the immediate actual possession of Lionel R. Stewart, property of Associated Dry Goods Corporation, a body corporate, of the value of about $24,000.00, consisting of $24,000.00 in money.

SECOND COUNT:

On or about March 23, 1966, within the District of Columbia, James L. Suggs and Clarence Blair made an assault on Lionel R. Stewart with a dangerous weapon, that is, a pistol.

THIRD COUNT:

On or about March 23, 1966, within the District of Columbia, James L. Suggs and Clarence Blair made an assault on Gerald Vaizey with a dangerous weapon, that is, a pistol.

FOURTH COUNT:

On or about March 23, 1966, within the District of Columbia, James L. Suggs and Clarence Blair made an assault on Allan H. Nordgren with a dangerous weapon, that is, a pistol.

FIFTH COUNT:

On or about March 23, 1966, within the District of Columbia, James L. Suggs did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

SIXTH COUNT:

On or about March 23, 1966, within the District of Columbia, Clarence Blair did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

verdict of guilty as charged, counts one through five, as to Suggs. Blair was found guilty as to count one and acquitted as to counts two, three, four, and six.

On May 4, 1966, Judge Sirica sentenced Suggs to terms of imprisonment of five to fifteen years under count one, forty months to ten years under each of counts two, three, and four, and one year under count five. The sentences under counts one through four were ordered to be served consecutive to each other; the sentence under count five was to be concurrent. A memorandum opinion on these sentences was filed by the court. Blair was sentenced to five to fifteen years for his conviction under count one.

The Government's Case-in-Chief

On March 23, 1966, right after closing time at the Lord and Taylor Department Store in Chevy Chase, four Negro men jumped out of a red Thunderbird parked in the parking lot and herded the three last departing employees at gunpoint back to the store where they forced them to reopen the store and unlock the safe and bound them. Shortly after the robbery was completed and the holdup men had fled, one of the employees untied himself and called the police. A radio lookout went out and the police quickly sighted the robbers in the getaway car. A high-speed pursuit followed as other police units joined the chase and the robbers recklessly drove down a one-way street the wrong way, engaged in many changes of direction, and were finally run to ground at 400 Hamilton Street, N.W., where the car was abandoned with two getting out on the left and running up a north alley and two getting out of the right hand side and running down a south alley. Appellant Blair was captured in the north alley; the other robber holed up in a residence, threatened the family, shot and killed a policeman, and committed suicide. Appellant Suggs was captured in the south alley; the other robber who ran down the south alley escaped.

The three employees involved in the robbery, Lionel Stewart, Allan Nordgren, and Gerald Vaizey, all testified

for the Government. Their testimony was to the effect that they had closed the store and were going their own way when four Negro men "erupted" from a red Thunderbird and went after each one of them and forced them to return to the employees' entrance at gunpoint, open the store, turn off the burglar alarm, go upstairs to the cashier's cage and unlock the store safe. Three of the holdup ment went upstairs with the employees while the fourth stayed below, put on a ski-mask and acted as lookout. (Tr. 13-34, 71-84, 88-95.) Mr. Vaizey identified Blair as the fourth man (Tr. 93). He also testified that he had seen Blair holding the bag identified as Government Exhibit 3 (Tr. 98). A ski-mask found on the street in the neighborhood where appellants were arrested was identified as resembling the one worn by the lookout (Tr. 20, 78, 270). During the robbery all three employees were repeatedly threatened. While they were up in the cashier's cage one of the robbers brandished a pistol and showed Mr. Stewart the bullet in the chamber and said, "you see that bullet in there. We mean business" and then pushed the bolt back in (Tr. 78). All three employees were bound. After the safe was rifled, the robbers fled, and a few minutes later one of the employees untied himself and called the police. (Tr. 73-76.)

The police radio lookout was transmitted at about 6:15 p.m. (Tr. 141). The red Thunderbird was first sighted going east on Military Road at Fourteenth Street, N.W., by Officers Ronald Day and Calvin Wilson (Tr. 146). As they commenced pursuit they radioed for assistance. The attempt at escape by the bandits ended at the 400 block of Hamilton Street, N.W., and included a high-speed spurt by the Thunderbird down a one-way street the wrong way (Tr. 142). Officers Thomas McGlynn and Thomas Dietrich entered the chase at Ingraham Street and got right behind the Thunderbird. They saw the car abandoned by two men who got out on the left side of the car and ran up a north alley and two men who got out of the right side and ran into a south alley. (Tr. 227-229.) Officer McGlynn

drove the police car up the alley, discharged Officer Dietrich who went after one of the men, and then got out himself and arrested Blair. There was a pair of gloves at the feet of Blair. (Tr. 230-233.) A gun battle ensued with the other bandit who by then had holed up in the home of a family (Tr. 245). A pillow case with about nine thousand dollars in cash, some gift certificates, and some checks, was found in front of the house where the dead robber was found (Tr. 266-267). A pair of gloves and a pistol was found near the body of the dead robber (Tr. 285-287, 292). In the yard of another house in that north alley, a loaded .38 caliber revolver was found (Tr. 281).

Motorcycle Officers Joseph Jacob and Norman Schroeder also entered the chase at Ingraham Street (Tr. 176). They went after the two who ran into the south alley (Tr. 179). One was carrying a khaki-colored bag with dark handles and the other was also carrying a bag. Officer Jacob lost sight of them for about eight seconds and then came upon Suggs who was crouched over the khaki bag (Government Exhibit 3) which covered a pair of gloves, a scarf, and a pistol (Government Exhibit 2). (Tr. 181-186). The bag contained rolls of change and Lord and Taylor gift certificates (Tr. 190-191). Later at the police station a .22 caliber bullet was recovered from the person of Suggs and $562 in currency was also found on him (Tr. 188-189, 195). The other man was never captured, but a pillow case with a lot of loose change and more gift certificates was found in the alley (Tr. 190-191). Officer Schroeder corroborated the testimony of Officer Jacob of the arrest of Suggs and the recovery of the evidence (Tr. 209).

Cortland Cunningham, an FBI expert in ballistics and firearms, testified that he conducted tests with the .22 pistol (Government Exhibit 2) and concluded that the .22 bullet recovered from Suggs had been loaded into the pistol (Tr. 57-59). Officer Robert Puckett, a fingerprint expert, testified that on the night of the robbery he removed a newspaper dated that day from the red Thunderbird impounded at police headquarters and lifted a fingerprint

from it which he testified was that of the right middle finger of Suggs (Tr. 331, 360).

Alvenie Rogers, an employee of Lord and Taylor, testified that two days prior to the robbery she saw Blair at closing time watching the employees' entrance at a time when the only people in the store were those that had to close it (Tr. 108, 110, 127, 138).

Appellant Blair's Defense

Appellant Blair's defense was an exculpatory explanation. He admitted his presence with the three other robbers immediately prior to and immediately subsequent to the robbery, but denied participation as either a principal or an aider or abettor. Blair also contradicted the testimony of Alvenie Rogers who had placed him watching the store at closing time two days prior to the robbery.

Blair testified that on March 21, 1966, (two days prior to the robbery) at about a quarter to six p.m., he took the family car and picked up his mother at work (Tr. 831). This was corroborated by the testimony of his mother and father (Tr. 384-385, 407-408). Blair denied that he had been watching the employees' entrance at the store at closing time on March 21, 1966 (Tr. 831).

On March 23, 1966, according to Blair's version, he got off work at 29th and M Streets, N.W., and because he did not have carfare to get home, he started walking to the Sears Roebuck store where his mother worked (Tr. 462-463). He met Richard Taylor at Wisconsin and Massachusetts Avenues, N.W., and talked with him for some time, about fifteen to twenty-five minutes (Tr. 463). This was corroborated by the testimony of Taylor (Tr. 426-428). Then after Taylor caught a bus and departed, three men—Melvin, Monk, and John Thomas—came driving up in a red Thunderbird and offered Blair a lift which he accepted (Tr. 463-464). Instead they drove to the department store and started putting on masks and pulling out pistols. Blair then said that he started walking away. (Tr. 465-466.) He saw them gather up the three em-

ployees and he heard the alarm ring; then as he continued walking, the red Thunderbird later pulled up beside him and he was told "you come with us. If we're charged with anything, we're not going to let you get this on us." (Tr. 468-469.) Blair testified that when he was arrested in the alley that he never had any gloves nor anything in his hands (Tr. 472). Blair denied having participated in the assaults or the robbery.

The Reverend James Bennett, pastor of the Mount Calvary Baptist Church testified as to Blair's good reputation for truth and honesty, peace and good order (Tr. 375). On cross-examination, Reverend Bennett testified that Blair's convictions for petty larceny in 1962 and for theft in 1965 did not change his opinion of the reputation of Blair. (Tr. 381). Blair admitted to the convictions in 1962 on two counts of petty larceny in the District and in 1965 for petty theft in Montgomery County (Tr. 889).

Appellant Suggs' Defense

Appellant Suggs' defense was alibi. He asserted that he was arrested at the mouth of the alley while watching the police chase the robbers (Tr. 951). The reason he was in the area was because he had been playing basketball at a nearby playground with his brother and a friend; also he had wanted to see a sister-in-law who lived at his mother-in-law's place at 5415 Fifth Street, N.W. (Tr. 999). Suggs and his brother and friend quit playing basketball and walked up to 5418 Fifth Street. Enroute Suggs exchanged a greeting with a friend, Annie Turner. (Tr. 946.) Finding no one home at 5415 Fifth Street, Suggs and his brother and friend started back to the playground and while on their way back, the getaway car and police came on the scene (Tr. 947). As he watched the chase, Suggs said he edged toward the alley and was arrested, according to his version, only after he could produce no identification (Tr. 1002-1003). Suggs said he had $662 dollars on him when arrested. He denied having been crouched over a bag or a pistol; he denied pos-

sessing a .22 bullet at the time of his arrest. (Tr. 1004, 1007, 1009.) Suggs also complained that one hundred dollars was stolen from him by the police (Tr. 1007). The only explanation he could offer for the fingerprint on the newspaper found in the Thunderbird was that he had touched a newspaper while at the police station (Tr. 1013). Suggs' explanation for the money found on him was that he was a wig salesman (Tr. 1141-1143). Suggs' alibi was generally corroborated by the testimony of his brother, Charles Suggs, and that of Annie Turner (Tr. 942-950, 895). It was also corroborated by the testimony of Blair who denied that Suggs was one of the other three men (Tr. 463-464).

Rebuttal

J. A. Warren, Jr., Blair's immediate superior at work on March 23, 1966, testified that he had offered Blair a ride that night and was told by Blair that he was going to go home and get his wife and get a new car (Tr. 1195-1197).

Mary Katherine LaNoir took the stand and testified that she lived at 8113 Fifth Street, N.W., on March 23, 1966, and that she saw two motorcycle policemen chase two Negro men into the alley (Tr. 1213). She did not see where one of the men went to, but did see a policeman bring one man out from around a garage with his hands up (Tr. 1213).

Detective Martin Hannon testified to the details of a statement given to him by Suggs at the police station on the night of the arrest. The details concerned Suggs' activities prior to and subsequent to the robbery (Tr. 1226-1230).

Officer Robert King testified that he saw the fingerprint expert, Officer Puckett, remove a newspaper from the Thunderbird which was impounded at the police station (Tr. 1244).

Officer Joe Jacob denied that Suggs pulled out any money when he arrested appellant (Tr. 1247). Officers

Coppage, McGlynn, and Dietrich denied that any one of them attempted to get Blair to place his fingerprints on a pistol recovered at the scene of the capture (Tr. 1247, 1249, 1251-1252).

Bertha Clark testified that she was a personnel assistant at the Sears Roebuck store where Blair's mother worked and that the punch card of Mrs. Blair showed that she checked out of work on March 21, 1966 at 1:40 p.m. (Tr. 1261-1264).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, Section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the viola-

tion occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

SUMMARY OF ARGUMENT

I

(A) The statutes against robbery and assault with a dangerous weapon protect different societal interests. The robbery statute is directed against a common criminal activity which can be committed in a myriad variety of ways and can be violated by a minimal invasion of personal privacy; the assault with a dangerous weapon statute is for the purpose of protecting against serious bodily harm. (B) In addition to the crime of robbery of A, appellants concurrently assaulted two other human beings, B and C, with a dangerous weapon. (C) Assault with a dangerous weapon is a common law rather than a "federal" crime. Since cumulative punishment is justifiable if it is proportionate to culpability, consecutive sentences were proper because each assault was an attack upon a discrete societal value, namely the worth of each individual human being.

II

The test for the admissibility of evidence is the balance of what it would add to the resolution of the essential issues of the case as opposed to the amount of time required to develop it, the danger of the interjection of prejudice, and the possibility it will divert the jury from the main issues of the case. The evidence in question here, impeaching evidence as to the arresting officers, would take a considerable amount of time to develop, would raise a danger of prejudice, and certainly would create an involved subsidiary issue of fact for the jury. In any event appellant Suggs was not prejudiced by the exclusion because he had three other witnesses to back up his alibi and

the Government had abundant evidence not related to the testimony sought to be impeached by evidence of bias.

III

No objections to the instructions were made at trial. In any event, the trial court properly instructed on the "asportation" required to prove robbery, and abundantly and correctly instructed on aiding and abetting.

IV

The items of circumstantial evidence were sufficiently linked to the robbery to be admitted. The .22 bullet was found on Suggs when he was searched at the police station. The fingerprint of Suggs was found on a newspaper located in the getaway car when it was searched the evening of the robbery; the newspaper was dated the same day as the date of the robbery. When captured, Suggs was crouched over a bag containing rolls of change and gift certificates a block away from the getaway car; the currency was found on Suggs at the police station.

V

Appellant Suggs made an exculpatory statement to the police that night after his arrest. Suggs testified at trial and gave an alibi and also accounted for his activities prior to and right after the robbers abandoned the getaway car. The prosecutor impeached Suggs' credibility by his prior inconsistent statements as to his activities prior to and subsequent to, but not during the robbery. No *Mallory* objection was made at trial so that the Government could develop the factual circumstances surrounding the statement or to forego the evidence entirely since it was impeaching evidence. Nor was a *Miranda* question fairly raised. Hence Suggs cannot pursue these points on appeal.

VI

The trial was lengthy, and vigorously prosecuted and zealously defended. A fair reading of the transcript shows that there was not undue participation by the trial court, nor were defense counsel intimidated by the trial court, nor was the cross-examination by the prosecutor prejudicial. No objection was made nor request that the judge instruct the jury to disregard two items of the prosecutor's closing argument.

ARGUMENT

I. The trial court was within its power to impose consecutive sentences for the convictions for one count of robbery and three counts of assault with a dangerous weapon.

Appellant Suggs was sentenced to consecutive terms for the convictions under count one for robbery and under counts two, three and four for assaulting the three employees with a dangerous weapon, a pistol. A memorandum opinion was filed by the trial court in which he stated the reasons that the consecutive sentences were necessary in order to achieve two recognized sentencing goals. See *Irby* v. *United States*, p. 7, D.C. Cir., No. 19,988, decided *en banc* on November 17, 1967.

A. *Consecutive terms of imprisonment could be imposed for the convictions for robbery and assault with a dangerous weapon.*

Under the rule of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), a single transaction which violates two different statutory provisions amounts to two offenses which may be punished by consecutive sentences if each statutory provision requires proof of a fact which the other does not. Robbery and assault with a dangerous weapon clearly satisfy this requirement. *Crosby* v. *United States*, 119 U.S. App. D.C. 244, 339 F.2d 743 (1964). Consecutive sentences are barred under the "rule of len-

ity" only when "there is substantial doubt as to whether Congress would have intended it to be imposed." *Irby* v. *United States*, *supra* at p. 3. In at least one instance, consecutive sentences for robbery and assault with a deadly weapon (pistol used as a bludgeon) arising from one transaction have been upheld. *United States* v. *Bauer*, 198 F.Supp. 753 (D.C. D.C. 1961).

Robbery as used in 22 D.C. Code § 2901 has been characterized alternatively as an "aggravated larceny," *Lamore* v. *United States*, 78 U.S. App. D.C. 12, 136 F.2d 766 (1943), and as a "crime against the person," *United States* v. *Mann*, 119 F.Supp. 406 (D.C.D.C. 1954). It has been held that the victim need not even know that he has been robbed, as in the pickpocket situation, *Turner* v. *United States*, 57 U.S. App. D.C. 39, 16 F.2d 535 (1926), or assaulted, ten dollars stealthily removed from trousers on nearby chair, *Spencer* v. *United States*, 73 U.S. App. D.C. 98, 116 F.2d 801 (1940), or even alive at the time of the robbery, *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961). The statute seems directed at the rather common criminal activity which can be carried out in a variety of ways. The minimal property aspect of "anything of value" is aggravated by the invasion of the privacy or security of the individual; the minimal affront to the person which will satisfy the statute is aggravated by the larceny aspect. As pointed out in *Irby* the classification of offenses into offenses against "property" or the "person" is not always helpful.

On the other hand, assault with a dangerous weapon is directed at protecting against serious bodily harm. The more severe penalties for violation of this statute as compared with those for simple assault reflect "a practical recognition of the additional risks posed by the use of the weapon." *Parker* v. *United States*, 123 U.S. App. D.C. 343, 346, 359 F.2d 1009, 1012 (1966). This statute punishes conduct which goes far beyond the minimal invasion of physical privacy which the robbery statute penalizes. A person who breaks this law goes far beyond the lar-

cenous intrusion upon the person that the robbery statute punishes; yet it cannot be said to encompass the robbery statute because the penalty is lighter than the maximum for robbery.

Ingram v. *United States*, 122 U.S. App. D.C. 334, 353 F.2d 872 (1965) and *Davenport* v. *United States*, 122 U.S. App. D.C. 344, 353 F.2d 882 (1965) are readily distinguishable in that each represents the merger of one violent assault into a more serious attack upon a single human being. Here robbery does not merge with the assault with a deadly weapon nor vice versa.

As pointed out by the trial court in its memorandum on sentencing, the assaults with a dangerous weapon upon the three employees were consummated prior to breaking into the store. This very factual situation itself demonstrates the separateness of this offense from that of robbery. This is not to argue that this case comes within the exact reasoning of *Irby*, but rather to show that under a concrete fact situation two different crimes were committed *seriatim*.

Since two discrete societal interests—(1) the protection against a larcenous invasion of privacy (2) the security of the person from serious bodily harm—were invaded, separate punishments for the offenses were properly imposed.

B. *The trial court could properly impose consecutive sentences for the robbery of Stewart and the assaults upon Vaizey and Nordgren.*

But even if consecutive sentences were not properly imposed for the convictions for robbery and assault with a dangerous weapon upon Mr. Stewart, the trial court properly could impose consecutive sentences for the robbery of Mr. Stewart, the assault with a dangerous weapon of Mr. Vaizey and the assault with a deadly weapon of Mr. Nordgren. Precisely this situation was faced in *People* v. *Ridley*, 47 Cal. Rept. 796, 408 P.2d 124 (1965), where a robber held up the proprietor and a sales clerk with a dan-

gerous weapon. Even though consecutive sentencing is closely controlled by statute in California, the California Supreme Court held that cumulative sentences properly were imposed for the robbery of the proprietor and the assault with a dangerous weapon upon the sales clerk.

C. *The trial court could properly impose consecutive sentences for the assaults upon Stewart, Vaizey and Nordgren.*

The trial court was within the scope of discretion of sentencing when it imposed consecutive terms of imprisonment for the convictions of the assaults with dangerous weapons upon the three store employees. *Cf. Bracey* v. *Zerbst*, 93 F.2d 8 (10th Cir. 1937); *Bracey* v. *Hill*, 77 F.2d 970 (3rd Cir. 1935). Unlike the "federal" offense cases relied upon by appellant Suggs, the crime of assault with a dangerous weapon is a derivative of common law ancestors. The reason for allowing imposition of cumulative punishment for assaultive crimes is very simple: each human being has a unique value in our society. Each person assaulted represents a distinct harm to society, an attack upon the value that society places in each human being.

Cumulative punishment is justified if it is proportionate to culpability and culpability increases with the number of persons endangered by a particular act. *Neal* v. *State*, 35 Cal. 2d 11, 357 P.2d 839 (1960) (consecutive sentences of two counts of attempted murder upheld where gasoline thrown on a married couple in their bedroom and ignited; opinion by Traynor, C.J.). See *People* v. *Johnson*, 26 Cal. Rept. 614, 210 Cal. App. 2d 273 (1962) (consecutive sentences for robbing more than one person at the same time); see also *Hoag* v. *New Jersey*, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958) (tavern holdup of several persons at gunpoint).

The cases relied upon by Suggs are inapposite. *Bell* v. *United States*, 349 U.S. 81 (1955), involved a conviction under the Mann Act for transporting two women at one time. There the substantive evil was the immoral traffic

in interstate commerce and there was no indication that Congress intended to increase the punishment because of the fortuity of the number of objects.[2] As for assaultive crimes, the common law clearly allows cumulative punishment because the focus is upon each human being.

Perhaps closer in factual circumstances is *Ladner* v. *United States*, 358 U.S. 169 (1958), where a single discharge of a shotgun wounded two federal officers. The Supreme Court noted that a reading of the statute and its legislative history indicated the statute involved was equally susceptible of a reading that the Congressional intent was to prevent hindrance of the execution of official federal duties and that the protection of the officers as individuals was incidental. 358 U.S. at 176. But the protection under the common law was the individual.

There is no indication that Congress in acting as the territorial legislature for the District of Columbia placed a lesser value on the individual than did the common law. Appellant has put forward no legislative history or construction of language which raises a substantial doubt that Congress intended to punish for each offense against a human being.

II. The trial court did not err in excluding the testimony of alleged bias and hostility of the officers who arrested appellant Suggs.

(Tr. 557, 691-698)

Appellant complains of the exclusion of the testimony of himself and his brother as to alleged police brutality which was proffered for the purpose of showing bias and hostility of the arresting officers Jacob and Schroeder (Appellant Suggs' Brief pp. 23, 27). The Government does not dispute that evidence of bias is relevant to the issue of the credibility of a witness. *Wynn* v. *United States*, D.C. Cir. No. 20,723, decided November 16, 1967; *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261

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[2] Compare *Gore* v. *United States*, 357 U.S. 386 (1958).

(1950). But rational or logical relevancy is only the first step in the process of the determination of the admissibility, or "legal relevance," of an item of evidence. The question then becomes whether the evidence should be excluded under some exclusionary policy. 1 WIGMORE, EVIDENCE § 11 (3rd ed. 1940). Two such considerations are whether the evidence introduces prejudice or confusion of issues among the jurors. *Cotton* v. *United States*, 361 F.2d 673, 676 (8th Cir. 1966); 1 WIGMORE, EVIDENCE § 29(a) (3rd ed. 1940); *Howser* v. *Pearson*, 95 F. Supp. 936, 941 (D.C.D.C. 1951); *cf. United States* v. *Spaeth*, 152 F. Supp. 216 (D.C.N.D. Ohio 1957). As Judge Learned Hand stated the problem:

> [T]he question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and expense it will involve, and by the chance that it will divert the jury from facts which should control their verdict.

United States v. *Krulewitch*, 145 F.2d 76, 80 (1944).

The trial court held a hearing out of the presence of the jury and received testimony on the alleged events of police brutality against both appellants. The hearing took up a full day of trial time. Both appellants related incidents of alleged beatings at the police station. Appellant Suggs and his brother testified as to alleged brutality at the scene of the arrest. This latter incident supposedly took place with onlooking bystanders from the neighborhood, but no such citizen was produced. The only other evidence that Suggs had was that he had a bruise on his shin at the subsequent preliminary hearing by the United States Commissioner. The accused policeman and other policemen present at the station house categorically denied the incidents as alleged by appellants. In addition, appellants alleged that the policemen made racial slurs to them; Suggs also accused the police of stealing one hundred dollars from him.

The trial court ruled against the admission of this evidence, primarily because of the danger of prejudice which would be introduced by allegations of police brutality with racial overtones, and because of the time it would take to present the testimony of both sides as to the incident with the consequent danger of submerging the main issue of the case in a morass of subsidiary questions. And the court weighed against that the fact that the evidence was impeachment rather than direct evidence. (Tr. 691-698.) See McCORMICK, EVIDENCE § 40 (1954).

Presumably impeachment of Officers Jacob and Schroeder would attack their credibility and hence their contribution to the case—the circumstances of the arrest of Suggs in the alley crouching over a bag containing rolls of change and gift certificates, a pistol, and a pair of gloves. But this was not the sole evidence against Suggs. Suggs expressly exculpated Officer Hannon from any brutality and it was Hannon who recovered the .22 bullet from Suggs' possession (Tr. 557). Also the fingerprint evidence linking Suggs to the robbery was not tainted by any allegations of police brutality. And, of course, it was undisputed that Suggs was arrested in the alley and that the .22 pistol which was found in the alley was linked to the bullet found on Suggs. Hence the allegations of bias were unrelated to the abundance of other cogent evidence.

And even if the exclusion of the evidence was erroneous it was certainly not prejudicial to Suggs. *Wynn* v. *United States, supra,* is readily distinguishable. Here the Government's case consists of much more than the specific details of the arrest of Suggs. And while the testimony of Mary LaNoir was not a model of clarity, it is susceptible upon a fair reading to the reading that two motorcycle officers chased two Negroes down an alley and one got away but the other was captured by a garage in the alley. Thus there is some corroboration of the officers' version. And, unlike appellant in *Wynn* v. *United States, supra,* Suggs was not the sole source of his alibi. Blair, Annie Turner, and the brother, Charles Suggs, all gave direct testimony

in support of his alibi. The jury was not forced to choose between Suggs and the police even on the circumstances of his presence in the neighborhood—it had to discredit the direct testimony of three other witnesses.

The danger of the introduction of prejudice into the trial, the amount of trial time which would have focused on the issue, and the consequent possibility of confusing the jury on a subsidiary issue of impeachment, all supported the ruling of the trial court on this point.

III. The trial court did not err in its instructions to the jury, none of which were objected to at trial.

(Tr. 1272, 1284, 1292-1298)

Appellant Suggs complains of a supposed incomplete instruction on an element of robbery, and Blair complains that the instruction on aiding and abetting should have been more extensive. But no supplementary instruction was filed or requested by appellants at trial. Hence, absent plain error, Fed. R. Crim. P. 30 precludes appellate review of these assignments of error in the instructions. *E.g.*, *Singer* v. *United States*, 380 U.S. 24, 38 (1965); *Kelly* v. *United States*, 125 U.S. App. D.C. 205, 370 F.2d 227 (1966). And there was no error, much less the plain error within the meaning of Fed. R. Crim. P. 52(b), in these instructions to the jury.

A. The trial court properly instructed the jury on robbery.

Appellant Suggs asserts that the jury was not instructed on "asportation" as an element of robbery (Appellant Suggs' Brief, p. 34). "Asportation" is the old common-law term used for the carrying-away aspect of robbery and larceny. PERKINS, CRIMINAL LAW 221 (1957). In robbery the element of asportation is necessarily included in the concept of "taking from the person," PERKINS, *supra* at 236, and the District of Columbia robbery statute also protects against taking from the "immediate ac-

tual possession of another." See *Neufield* v. *United States*, 73 U.S. App. D.C. 174, 118 F.2d 375 (1941), *cert. denied*, 315 U.S. 798 (1942) (cash in a nearby drawer in a bank); *Spencer* v. *United States*, 73 U.S. App. D.C. 98, 116 F.2d 801 (1940) (money from trousers on a nearby chair). Since the trial court properly instructed on the element of taking from the person or the immediate actual possession of another, it necessarily instructed on "asportation" (Tr. 1284).

B. *The trial court properly instructed on aiding and abetting.*

The trial court extensively instructed the jury on aiding and abetting (Tr. 1292-1298), and there was no request by Blair's attorney that any supplementary instruction be given on the subject (Tr. 1272). The trial court instructed that mere presence was not sufficient to convict as an aider or abettor (Tr. 1294, 1297), and the instructions included the following:

> Now, a person aids or abets another in the commission of a crime if he knowingly associates himself in some way with the criminal venture with the intent to commit the crime and participates in it as something he wishes to bring about, and seeks by some action of his to make it succeed. (Tr. 1292.)
>
> So conduct by a defendant of an affirmative character in the furtherance of a common criminal design, scheme or purpose is necessary. (Tr. 1294.)

The instruction apprised the jury that a person aids or abets when he knowingly associates himself in some way with the criminal venture. *Long* v. *United States*, 124 U.S. App. D.C. 14, 360 F.2d 829 (1966). In addition an example was given to the jury to illustrate that mere presence is not sufficient to convict as an aider or abettor (Tr. 1295-1297). As recently pointed out in *Howard* v. *United States*, p. 3, D.C. Cir. No. 20,328, decided December 6, 1967, once a trial court has made a correct charge, any

amplification is largely within his discretion, particularly when no objection to the instruction is made at trial.

Moreover, this is not a case where an ambiguous instruction is exacerbated by a dearth of evidence. Blair by his own testimony admits that he was with the robbers, which he numbered as three, immediately precedent to and immediately subsequent to the robbery. All three employees testified that four men participated in the robbery itself and one of the employees identified Blair at trial. When captured Blair had a pair of gloves at his feet in the alley.

IV. The items of circumstantial evidence were sufficiently linked to appellant Suggs to be admissible.

(Tr. 59, 185-186)

Appellant Suggs asserts that the testimony that he had $562 in his possession was erroneously admitted (Appellant Suggs' Brief, p. 50). It is well settled that money found on a defendant is admissible if there are evidentiary circumstances connecting the money to the robbery. *State* v. *Hancock*, 426 P.2d 872, 874 (Ore. 1967); *Self* v. *United States*, 249 F.2d 32 (5th Cir. 1957); *State* v. *Cofer*, 73 Idaho 181, 249 P.2d 197 (1952). In this case Suggs was captured in an alley after jumping out of the getaway car. At the time of his arrest he was crouched over a bag containing rolls of change and gift certificates from the robbed department store, a pistol, a scarf, and a pair of gloves. In addition a fingerprint of Suggs on a newspaper of that very day was found in the getaway car. These were sufficient evidentiary links to allow the admission of the testimony of the currency. Suggs' complaint goes to weight not admissibility.

A .22 caliber bullet also was recovered from the possession of appellant at the police station. An FBI ballistics expert testified that it had been ejected from the pistol found on the ground where appellant was arrested. (Tr. 59, 185-186.) This further linked Suggs to the pistol

found in the alley of escape by armed robbers and was probative (1) that Suggs was one of the armed robbers, and (2) that Suggs was carrying a pistol without a license. Furthermore no objection on the ground of relevancy was made and hence it cannot be raised on appeal.

Officer Puckett was qualified by the court to testify as an expert on fingerprints. He testified that on the night of the robbery he was called to duty and went down to the getaway car which was impounded in police headquarters. There he "dusted" the car for latent fingerprints and also removed a newspaper, the Washington Daily News, dated on that day, March 23, 1966, from the right front seat.[3] None of the prints lifted from the automobile itself were sufficiently good for identification purposes, but one good print was lifted from the newspaper and identified as the right middle finger of Suggs. Appellant Suggs' reliance upon *Borum* v. *United States*, —— U.S. App. D.C. ——, 380 F.2d 595 (1967) and *Hiet* v. *United States*, 124 U.S. App. D.C. 313, 365 F.2d 504 (1966) is misplaced. In this case obviously the fingerprint was placed on the paper the date of the robbery; next the paper was found in the getaway car that night at police headquarters; and Suggs was placed in the near proximity of the getaway car under highly probative circumstances right after the robbers were run to ground. Appellant Suggs' assertion on this item of evidence is tantamount to a claim that the police planted that evidence after tricking him to place his fingerprint on it and it is in the same class as the claim that the .22 bullet was "planted" on him.[4]

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[3] The robbers who ran down the alley where Suggs was arrested had emerged from the right side of the automobile. The slain robber had been the driver and Blair had been sitting in the left rear seat of the car.

[4] Suggs' defense *in toto* amounts to assertions of manufactured testimony and planted evidence. And why? All because he had the misfortune to be in the area with no identification on him.

V. The trial court properly allowed impeachment of appellant Suggs by evidence of prior inconsistent statements.

(Tr. 1219-1220)

Appellant Suggs' defense consisted of an alibi at the time of the robbery and an elaborate explanation of why he happened to be in that particular alley right after the holdup men had run down it. In rebuttal for impeachment, the Government put Officer Hannon on the stand and he related the statements that Suggs had given him at the police station which accounted for Suggs' activities prior to and subsequent to the robbery. No direct attack was made on the alibi, *i.e.*, the whereabouts at the time of the robbery itself. *Tate* v. *United States*, 109 U.S. App. D.C. 13, 283 F.2d 377 (1960). No objection was made nor a hearing requested on the basis that the statements were admitted in violation of *Mallory* v. *United States*, 354 U.S. 449 (1957). Therefore the issue cannot be litigated on appeal. *Cantrell* v. *United States*, 116 U.S. App. D.S. 311, 323 F.2d 613 (1963); *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Williams* v. *United States*, 113 U.S. App. D.C. 7, 303 F.2d 772, *cert. denied*, 369 U.S. 875 (1962). With no objection on the matter the trial court is denied an opportunity to prevent or expunge error, and the Government an opportunity to develop the facts as to the circumstances of the statement. Furthermore, the Government is precluded from deciding to forego the evidence (which was impeachment rather than direct evidence), or to confine it to the activities of Suggs, say, in the morning hours so that the impeachment is quite remote from the directly contested issues. *Cf. Carter* v. *United States*, —— U.S. App. D.C. ——, 379 F.2d 147 (1967).

Suggs also makes a belated claim under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) as to the introduction of the police officer's testimony. At trial some vague objection was made that Suggs had not been advised of his

"rights" when he made the statements (Tr. 1219-1220). It was not clear if these were even Constitutional rights as distinct from Rule 5(a), Fed. R. Crim. P., rights. But it is necessary to have reasonably apprised the trial court of the particular Constitutional claim in the objection to the receipt of evidence in order to pursue the matter on appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Again, the Government was not put on notice to develop the factual background of the statements nor afforded an opportunity to forego the use of the impeaching testimony. And the failure to object with adequate clarity should be even less tolerated in a situation involving *Miranda*, a case of wide publicity. *United States* v. *Armetta*, 378 F.2d 658, 661 (2d Cir. 1967).

VI. Appellants were not deprived of a fair trial by the trial court, their counsel, or the prosecutor.

(Tr. 69b, 217-218, 375, 379-382, 460, 480-81, 488, 599, 610, 612, 612a, 887, 889, 890-92, 963-64, 982, 997-998, 1004, 1007-1008, 1069-1077, 1091-1093, 1114-1118, 1122, 1125-1128, 1146-1154, 1184-1187)

As reflected by the transcript, this case was lengthy. It was vigorously prosecuted and zealously defended. The trial court sequestered the jury to insulate them from becoming contaminated by any public passion. On the one hand, there was the danger that the jury would hear testimony that a police officer was killed in capturing one of the holdup men; on the other hand, there was a tendency of the defendant's counsel to interject a tangential issue of police brutality. Although appellants alternatively attack the trial judge, defense counsel, and the prosecutors, a fair reading of the transcript, we submit, does not indicate that appellants were denied a fair trial. This seems to be a case where the following quotation is appropriate:

> The trial was long and the incidents relied upon by petitioner few. We must guard against the magnifi-

cation on appeal of instances which were of little importance in their setting.

Glasser v. *United States*, 315 U.S. 60, 83 (1942).

A. *The trial court did not intimidate appellants' trial counsel so as to deprive appellants of effective assistance of counsel at trial.*

As counsel for appellants sought to interject the issue of police brutality into the case, the trial judge held a conference with all sides after the jury was excused. At that time the trial judge chastised Blair's attorney for failure as a lawyer, an officer of the court, to take affirmative action on his own initiative as to the alleged police misconduct to his client, and said "I am thinking seriously of referring this case to the Grievance Committee." (Tr. 488.) The associate of Suggs' attorney was also admonished out of the presence of the jury as to his facial expressions toward the judge (Tr. 480-481).

On the basis of this, appellants claim that the trial court so intimidated their counsel as to deprive them of effective assistance of counsel at trial. Appellants can really point to nothing in the record to substantiate this claim except the affidavits of their trial counsel. The alleged police misconduct issue—the one which precipitated the colloquy—was thoroughly developed by the trial court at a hearing. No other instances are pointed out in the record to show that trial counsel did not effectively represent their clients at trial. In fact, the record seemingly negates any intimidation on the part of defense counsel when the transcript shows that defense counsel openly laughed at one of the prosecutor's closing arguments. (Tr. 69-b.) The affidavits of trial counsel point to no particular thing which they failed to do, or did ineptly, or other misstep which was brought about by the "intimidation" at trial.[5]

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[5] The affidavits of trial counsel raise puzzeling problems under Canons 15, 22 and 44 of the American Bar Association.

B. *The trial court's supervision of the trial did not deprive appellants of a fair trial.*

(1) Blair

Near the start of the trial, the trial judge admonished Blair out of the presence of the jury for moving his head in disagreement as an adverse witness testified. This was a proper admonishment to preserve the decorum of the court and to avoid any distraction of the jury from the evidence being given at trial. Since the admonition was given out of the presence of the jurors, Blair suffered no prejudice. *United States* v. *Kelley*, 314 F.2d 461, 463 (6th Cir. 1963).

At trial, Blair affirmatively put his reputation in the community into contention by calling Reverend Bennett who testified as to Blair's good reputation for truth and veracity, peace and good order (Tr. 375). A bench conference was requested by the prosecutor during cross-examination of Reverend Bennett in order to ask permission to interrogate the witness as to his knowledge of prior arrests and convictions of Blair. The trial court said that he would give a cautionary instruction to the jury as to the purpose of such evidence. No objection was made to the instruction. (Tr. 379-380.) After the instruction was given, the prosecutor asked the minister if he knew of two prior convictions for larceny and theft by Blair and if that changed Reverend Bennett's opinion of the reputation of Blair (Tr. 381-382). Later, after cross-examination of Blair by the prosecutor, and in order to clarify any puzzlement by the jury as to the convictions, the trial court asked the prosecutor if he was going to ask Blair about the prior convictions (Tr. 887). The prosecutor said that it had slipped his mind and asked Blair who admitted the convictions (Tr. 889). Again the jury was instructed on the limited character of the evidence and there was no objection by Blair's attorney (Tr. 890-892). Since Blair put his reputation into contention, he cannot claim that he suffered prejudice when his character witness was in-

terrogated about the knowledge and impact of Blair's convictions upon his reputation in the community. The limiting instructions were designed to avoid prejudice to Blair and his counsel did not object to them at trial.

After a witness for Blair had given his testimony and had been cross-examined by the Government, the trial court excused the jury and examined the witness and then declared that he thought that the witness was "lying." The jury was called back in and the prosecutor further cross-examined the witness on what he had been wearing and what Blair had been wearing on the date of the hold-up; then the court cut off cross-examination for being repetitious. (Tr. 460). Since the witness had already given his testimony and since the questioning and comment on the witness' credibility was out of the presence of the jury, Blair suffered no prejudice from this incident.

(2) Suggs

Suggs' defense was that of alibi and an explanation of having the currency in his possession. The trial court recognized that it was his best defense, but that if it was not a good defense it would hurt Suggs much more than silence. At this point in trial, the judge wanted more facts developed on the wig business of Suggs. At the next session, Suggs presented two witnesses and his wig case to show that he had been in the wig business. (Tr. 1184-1187.) As for the attempted impeachment by the prosecutor by prior testimony, the trial court's instructions were designed to focus the jury's attention on the purpose of the impeachment process, and was a proper judicial function (Tr. 1091-1093, 1114-1118, 1122).

Upon cross-examination of Suggs as to how the fingerprints came to be on a newspaper found in the red Thunderbird that evening, the prosecutor focused the issue as an attack upon Officer Puckett's testimony that he found the newspaper in the car. There was an objection, but no specific reason was given. The jury could believe, of

course, that another police officer "planted" the newspaper in the car prior to inspection by Officer Puckett. If this was error, it was certainly harmless error.

Suggs' other complaints, directed at events transcribed at Tr. 217-218, 997-998, 1007-1008, do not survive a reading of the transcript.

C. *Appellant Suggs was not deprived of a fair trial by either the cross-examination or the jury argument by the prosecutor.*

As for the complaint that the prosecutor asked for yes or no answers on "multi-factual" questions and placed Suggs at an unfair advantage before the jury, the cited transcript pages (Tr. 1069-1077, 1125-1128) shows that Suggs was given an opportunity to fully explain his answer and give his version.

The prosecutor also impeached appellant Suggs' brother, Charles Suggs, by his testimony the previous day on "police brutality." At that hearing, Charles Suggs testified that he was unfamiliar with the area from the bus stop to the playground (Tr. 610) *and* that he was also unfamiliar with the street (Hammond) (Tr. 963). Thus this impeachment was proper. The other points on the cross-examination of Charles Suggs raise no substantial issue of prejudice (Tr. 599, 612, 612a, 964, 982).

The prosecutor properly impeached the testimony of appellant Suggs when he pointed out that on Friday before the jury Suggs testified that he stayed at Precinct 10 for "an hour at most" (Tr. 1004) and then on the next Monday testified that he stayed there for "a matter of minutes." The examination and cross-examination on Suggs' wig business went on before the jury and they were in a position to tell for themselves as to what was asked, what was answered, and the existence of impeachment, if any (Tr. 1146-1154).

No objections were made to the prosecutor's closing argument nor was a mistrial requested, and any objection

cannot now be urged upon this court. *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 296 F.2d 434 (1961).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

No. 21033*

CLARENCE BLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

HILLEL ABRAMS
Counsel for Appellant
(Appointed by this Court)

8720 Georgia Avenue, #400
Silver Spring, Md. 20910

* Consolidated for appeal with Suggs v. United States, No. 21034.

In the UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit.

No. 21033

CLARENCE BLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT BLAIR

Two points of error were commonly shared by Appellants Blair and Suggs in this Appeal. First, that the trial court erred in its exclusion of evidence offered to show bias and hostility on the part of the arresting police officers going to the credibility of their testimony. This point was argued in Appellant Suggs' brief (Point II) and was adopted by reference in Appellant Blair's brief at page 12. Secondly, that the conduct of the trial judge deprived the Appellants of a fair trial. This point was argued by Appellant Blair as Points I, II and III of his brief and adopted by Appellant Suggs on page 59 of Suggs' brief.

Appellant Blair adopts by reference as much of the reply brief of Appellant Suggs regarding these two points as is applicable to Appellant Blair and the law of the case.

This reply is therefore supplemental to the reply brief of Appellant Suggs and will correspond in number to the Points or arguments made in Appellee's Brief, relating to matters of record which may not be adequately met by reference to either Appellants' briefs or Suggs' reply brief.

Appellee's Argument--II

The argument of Appellant Suggs relating to the error of the trial court in excluding the testimony of bias and hostility on the part of the arresting officers (as relating to Blair) was adopted by reference as to Appellant Blair (Blair Br. 12).

It was Blair who first raised the issue of misconduct on the part of the arresting Officer (McGlynn), for the purpose of showing bias and hostility on the part of a key witness for the Government (Tr. 475-485). Officer McGlynn was the only witness who testified that a pair of gloves was found at Blair's feet when arrested (Tr. 232). Blair denied having the gloves in his possession (Tr. 472). After a short hearing out of the presence of the jury, in which Blair testified that he was beaten, vilified and threatened with serious bodily harm, and accused that it was his fault a police officer was killed (Tr. 482-485), the trial judge sustained the objection of the Government to the evidence, saying: "I am not going to inject any bias or prejudice in this case. I think it would be an injustice to the rights of the Government, and I think for your client." (Tr. 483)

The following day the trial judge requested that further testimony be taken out of the presence of the jury concerning police brutality, at the conclusion of which the Court (Tr. 691) reiterated its ruling of the day before sustaining the Government's objection to any testimony of brutality by police officers who previously testified.

There is no question but that the issue of credibility was of prime importance in this case. The testimony given by Officer McGlynn that he found the gloves at the foot of Appellant Blair when the latter was arrested, placed the Appellant Blair, by implication, within the Lord and Taylor Department Store at the time

of the robbery. The only other witness whose testimony places Blair at the scene of crime was Gerald Vaizey, department manager for Lord and Taylor (Tr. 93). Mr. Vaizey testified that it was Blair who held a gun against him (Tr. 91) and forced his return to the store. The jury, however, elected not to believe Mr. Vaizey. It did not find Blair guilty of assault with a dangerous weapon (Counts 2, 3 and 4), and not guilty of carrying a dangerous weapon (Count 6).

The credibility of Blair was challenged a number of times, first when Reverend Bennett testified for Blair (Tr. 381), and then again when Blair concluded testifying in his own behalf (Tr. 889). The challenges were strengthened in the jury's mind when the Court specially instructed it concerning such challenges immediately preceding (Tr. 380) and following the examination (Tr. 889).

The second of these instructions (Tr. 890) used the police officers as examples of witnesses whose credibility was offered for challenge when placed on the witness-stand.

Appellant Blair denied being inside Lord and Taylor and further denied having the gloves in his possession at the time of the arrest.

The jury was therefore left to choose between Blair (whose credibility was challenged) and Officer McGlynn (whose credibility was left unchallenged). Wynn v. United States, D. C. Cir. No. 20,723, decided November 16, 1967.

Appellee's concern lest prejudice be introduced into the trial (Appellee's Br. 19) is somewhat incongruous. It was the Government which introduced extensive testimony of the high-speed chase and reckless driving, the shooting that took place

between the police officer and John Eldridge (Tr. 255-259); and the blood-stained glove found near the body of Eldridge (Tr. 292).

The trial judge heard all the testimony of bias and hostility out of the presence of the jury. There was nothing to prevent him from allowing sufficient testimony of bias and hostility to go to the jury in order to safeguard the rights of Appellants and at the same time prevent undue prejudice and confusion. Total exclusion, on the other hand, was reversible error. For authorities, see Point II of Appellant Suggs' brief.

Appellee's Argument--VI

Appellee contends that the record is void of facts which would substantiate the claim that Appellants lacked effective assistance of counsel (Appellee's Br. 25). Appellee contends that Appellants' case was vigorously and effectively represented (Appellee's Br. 24). Yet, on the other hand, Appellee seeks to take advantage of the numerous occasions in which counsel for Appellants failed to object to instructions given by the court during Appellants' case (Appellee's Br. 26), to undue intervention of the court in the cross-examination of witnesses (Appellee's Br. 26-27), to evidence (Appellee's Br. 22, 23), and to the instructions given at the conclusion of the trial (Appellee's Br. 19, 21).

Appellee further implies that the issue of a fair trial, or lack thereof, was first raised by Appellants in their briefs. In doing so, Appellee ignores the notice of appeal and Appellant's application for bond pending appeal, in which ample reference was made to this issue.

Appellee contends that the failure of counsel for Appellants to object, for the record, to the undue criticism and conduct of the court, proves that Appellants suffered no prejudice therefrom (Appellee's Br. 25). In doing so, Appellee ignores the fact that the by-product of such conduct (which Appellee categorizes as "intimidation") is silence. Had counsel taken the matter lightly, as suggested by Appellee, fearing no drastic consequences, he would have voiced his objection rather than have to justify his conduct as he subsequently did.

This is not to say that the "intimidation" was a conscious act calculated to deprive the Appellants of a fair trial. The end result, however, did produce an unfair trial, for which Appellants seek a reversal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed, postage prepaid, this ____ day of _____, 1968, to Frank Q. Nebeker, assistant United States Attorney, U. S. Court House, 3rd and Constitution Ave. N.W., Washington, D.C. 20001.

Hillel Abrams

Hillel Abrams

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

No. 21034*

JAMES L. SUGGS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the District of Columbia

FREDERICK H. WALTON, JR.
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938 Bowen Building
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*Consolidated for appeal with Blair v. United States, No. 21033.

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 21034

JAMES L. SUGGS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

REPLY BRIEF FOR APPELLANT

Reply herein is limited[1/] ~~to~~ those points or arguments in appellee's brief presenting matters of record or authority which may not be adequately met by reference to appellant's main brief and which

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1/ Since the subject of consideration in this reply are limited to matters in appellee's brief, headings and their numerical designation in argument will correspond to those appearing in appellee's brief.

the instant reply will undertake to meet or clarify.

Appellee's Counterstatement of the Case

The trial record (Tr. 183) contradicts the appellee's counterstatement (Br. p. 5) in that the khaki bag (Government Exhibit 3) covered only the pistol (Tr. 185) while the scarf and gloves were in the bag itself.

Appellant's activity as a wig salesman (appellee's Br. p. 8[2/]) was corroborated by two witnesses presented by the defense to satisfy the burden imposed on the defense (Tr. 1045, 1131-2) by the trial court's statement in open court near the end of the defendant's case (Tr. 1037-8; see appellant's Brief p. 30-31). Further corroboration was provided by appellant's business card and wig case used in that activity. (Def. Suggs Exhibits 10 and 11, Tr. 1139, 1144-5)

The details (appellee's Br. p. 8) concerning appellant's activities developed by police interrogation after arrest included matters not only prior to and subsequent to the robbery but also those during the robbery. Tr. 1233

2/ On that same page, a typographical error is noted in that Mrs. LaNoir's address should be stated as 5113 Fifth Street, N. W. Tr. 1210

Appellee's Argument-I (Sentencing)

The Bauer case[3/] cited and relied upon by the appellee is clearly distinguishable on its facts, since it was established in that case that the proof of physical injury which sustained the assault count was inflicted on the victim by use of a pistol as a bludgeon after the completion of the act of robbery. As such it was a separate and distinct criminal act of physical injury to the victim and not the means by which the robbery was consummated.

There is no substance to appellee's argument (Br. pp 13-14) that separate punishments for conviction of robbery and of assault with a dangerous weapon were properly imposed because discrete societal interests are involved, i.e., protection against a larcenous invasion of property in the case of robbery as against protection of the person against serious bodily harm in the case of assault. In the first place, appellant's arguments on the trial court's sentencing error do not require, as appellee appears to suggest, a holding by this court that the separate convictions may not be separately punished. This court is asked to hold only that in the context of the facts of the instant case, the punishments may not be consecutively or cumulatively imposed. Nor is it true as appellee argues that discrete societal

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3/ United States v. Bauer, 198 F Supp. 753 (D.C.D.C. 1961)

interests are involved in the instant case, if such interests are being evaluated in the sense discussed in the Irby case.[4/] The authorities are uniform in their inclusion of both robbery and assault with a dangerous weapon as offenses against the person.[5/] It is not logically permissible, as appellee has attempted, to isolate and advert only to the larcenous elements of robbery in which little or no physical injury to the person may be involved for purposes of comparison only with the serious bodily injury that may be involved in an assault with a dangerous weapon. Such selective comparisons may favor but cannot prove appellee's argument because the converse of that comparison would show that serious bodily injury may and indeed frequently is involved in a robbery just as an assault with a dangerous weapon may be established by threat alone without the inflicting of any bodily injury--serious or otherwise. Indeed, it is precisely for this reason that appellee's argument is singularly inapposite to the factual context in the instant case because the assaults of which appellant was convicted involved "threats" alone incident solely to the robbery and no physical injury to any of the identified victims. This fact, moreover,

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4/ If "discrete societal interests" as used by appellee mean no more than that the two crimes are separate and distinct in legal definition, appellant would concede this to be so, although the concession can be of no help to appellee in meeting the arguments in appellant's main brief which reach a different point.

5/ Both were grouped under that same heading as Sections 810 and 804 respectively of D. C. Code (1901). See also 2 WHARTON, CRIMINAL LAW p. 243 §546 (12th Ed.); PERKINS CRIMINAL LAW 148 (1957)- "...as a matter of social harm its [robbery] chief significance is that of an offense against the person."

is the basis for appellant's argument, inter alia, that the assault proved in the instant case, which involved threat but not physical injury, was merged with the robbery of which it was an indispensable part and without which the robbery could not have been proved. The same threats that proved the assault were indispensable to proof of the robbery.

Contrary to appellee's assertion and the trial court's view, the concrete fact situation of this case does not show commission of two different crimes which involve sufficiently separate criminal purposes and are committed seriatim as in Irby. In the case at bar, the herding of the three employees, as referred to by appellee's counterstatement (p. 3), by threats alone was not separate from nor a departure from the "planned armed robbery" to which the District Court referred but rather was an integral continuing element of the robbery itself without which the robbery could not be proved and which had no objective purpose or intent apart from the robbery.

In its effort to distinguish the Ingram[3/] and Davenport cases relied on by appellant, the appellee has misapprehended the decisions in both cases as turning on a merger of a "violent assault into a more serious attack upon a single human being" (appellee's Br. 14) But even if appellee's argument were accepted, it would certainly follow

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3/ Errata p. 15 appellant's brief, the last word of the quotation from the Ingram decision should read "unclear."

that there is as much or even more ground for finding in the case at bar a merger of the assault with a dangerous weapon with the robbery of which it was an indispensable part as there would have been in appellee's view for the merger of the assault with a dangerous weapon with the manslaughter for which punishments were invalidly pyramided in the Davenport case.

Before leaving this area of dispute, appellant is obliged to note a ruling of this court coming to appellant's attention after filing of his brief. In the Thomas case[7/] this court ruled that robbery is not included among the crimes of violence enumerated by D.C. Code § 22-3201. Notwithstanding that ruling, appellant believes that the action of Congress in passing the so-called Dangerous Weapons Act[8/] raises sufficient doubt[9/] as to the congressional policy and intent in the imposition of added punishment for commission of a variety of felonies by use of firearms, so as to require in addition to other arguments of appellant's main brief, application of the policy of lenity and call for setting aside of the consecutive sentencing action of the court below.

7/ Thomas v. United States 93App DC 282, 210 F2d 21 (U.S. App D.C. 1954)

8/ See appellant's Brief pp 9-14 (errata for Br. p. 10--change HR 5734 to read HR 5754 and Senate Report No. to read 575)

9/ It may be noted that in 24 D.C. Code §203(b) (1937 Ed.), cited in fn 3, p. 12 of appellant's brief a minimum sentence of 2 years imprisonment is required by statute for a conviction for "armed robbery in violation of section 22-3202"--emphasis supplied--if there has been any prior conviction by D. C. Code 22-3201.

The California case--People v Ridley--relied upon by appellee (Br. pp 14-15) is clearly distinguishable because the challenged sentences in that case were concurrent and not consecutive. As already discussed supra, this case presents a claim of error because of consecutive sentencing and not because of concurrent sentencing. Moreoever, in the Ridley case, bodily injury was inflicted in the course of the robbery upon a person other than the victim of the robbery. This distinguishing point has additional significance in the instant case as possibly explaining appellee's presumed suggestion that this court might find grounds for setting aside the consecutive sentences for the convictions for robbery and assault with a dangerous weapon in the case of Mr. Stewart. This possibility could be derived from this statement of the California court:

> "Here it appears that the assault upon Bennett [the robbery victim] was the means of perpetrating the robbery and that both offenses were incident to one objective, robbery. Accordingly, if upon retrial, the same evidence is introduced relating to this point and Ridley is convicted of both offenses, he may be sentenced only for the first degree robbery, the more serious of the two offenses." 408 P2d at 128

The cases cited by appellee (Br. 15-16) in support of its arguments on the validity of consecutive sentencing involve convictions of different assaults on the same person (Bracey case), attempted murder of two different persons (Neal case), robberies of three different persons (Johnson case),and the Hoag case which involved conviction on a single robbery count of one person with no consecutive sentencing.

As such, each are distinguishable. None presents the factual context of this case, i.e., the assaults consisting of a continuing threat directed to the three employees in common without physical injury, leading to and by sole means of which the objective of robbery was consummated. In the Neal case consecutive sentencing was upheld because two different intents or objectives of criminal conduct were involved, i.e., the attempted murder of two persons.[10/] In the instant case; only one objective--robbery--was proved.

In its effort to distinguish the Bell and Ladner cases, appellee lays exaggered stress upon the concern of the common law of crimes for protection of the individual. Though it may be conceded that society has a proper concern for its individual members in proscribing criminal conduct, it does not follow, as appellee's undue stress would suggest, that criminal law is enforced for the protection of individuals.

> "A public wrong or crime, is a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capactiy [citation cmitted]. This latter class of wrongs affects the whole community and not merely individual members of the community, hence, the public good requires the state to interfere and punish the wrongdoer. The punishment is imposed for the protection of the public, and not because of the injury to an individual. The latter must seek redress in a civil action. "[11/]

10/ Significantly the court set aside the punishment imposed for the conviction for arson which was the means used in attempting the murders.

11/ CLARK AND MARSHALL, CRIMES, p. 89 §2.01 (3th ed. 1958)

As noted and quoted in appellant's Brief (pp 21-22), the Supreme Court in the Ladner case questioned the soundness of a policy that would impose consecutive sentencing according to the number of objects affected by criminal conduct with a single objective. Although the Supreme Court was construing a statute for a Federally created crime the views it expressed do not lack relevancy to criminal laws enacted for the District of Columbia,[12/] particularly since the Supreme Court has noted the unacceptable incongruity and disproportion of punishment to culpability which would arise upon comparison of a 10 year maximum sentence for seriously wounding one person with a 50 year maximum by consecutive sentencing for pointing a gun at 5 persons who are not fired upon and are uninjured. (appellant's Brief pp 21-22) This same rationale would clearly disapprove the consecutive sentencing of appellant to a 30 year pyramiding for threats of violence in common to three persons who were uninjured in the perpetration of an armed robbery for which an additional 15 year maximum term of punishment was likewise pyramided.

12/ This is evident from this court's citation and reliance upon those views in both the Ingram and Davenport cases.

Appellee's Argument II

Appellants Blair and Suggs submit that appellee has misapprehended the legal authorities and precedent applicable to the claim of reversible error which appellants have urged by virtue of the trial court's total exclusion of any evidence by the defence to show bias and hostility of the arresting officers. Thus, appellee has cited and relied upon authority which upholds the discretion of the trial court to determine the limits and extent of the evidence that will be permitted once "the main circumstances from which the bias proceeds have been proven." McCORMICK, EVIDENCE §40, p. 85 (1954) (citing cases which include rulings of undue curbing by trial court of bias evidence) This same authority, which was cited elsewhere by appellee (Br. p. 18), also clearly states that "the attacker has the right to prove those facts [bias, hostility, etc.] by extrinsic evidence." Id at p. 83.

To the same effect is the following statement of other authority

> "The nature of the trial may be such that the exclusion of evidence of hostility of the complaining witness constitutes reversible error and while the court has discretion to limit the quantity of oral evidence bearing on the hostility of the witness it cannot exclude all evidence

of that fact.[13/]

The efforts in appellee's Brief (p. 38) to show the contrary lead nowhere and miss the point, involved as they are with citation of authority upholding the trial court's discretion to control what, if any, collateral matters may be offered or pursued as evidence. The answer is that facts showing bias or hostility of a witness against a defendant are not collateral matters.[14/]

Appellee's other principal argument on this point is that the trial court's total exclusion of the bias and hostility of the testimony of the arresting officers was not prejudicial to appellant because of an abundance of other cogent evidence.[15/] This argument cannot be taken seriously in view of appellants' attack[16/] (appellant's Br. pp 50-59)

13/ WHARTON, CRIMINAL EVIDENCE, 1958 Cum. Suppl. p. 58 suppl. to p. 324 after note 2. Citations which were excluded from the language quoted above, included People v. McDowell 9 NY2d 12, 210 NYS2d 514, 172 NE2d 279 (1961) which stated as the settled rule that "the hostility of a witness toward a party against whom he is called may be proved by any competent evidence by cross or by other witnesses." 172 NE2d at 280.

14/ McCORMICK, EVIDENCE §40, p. 86 (1954)

15/ This court was unimpressed with a similar argument and ordered a new trial in a recent decision in which error was claimed to be non-prejudicial to the defendant because of the strength of the government's total case. Garris v. United States, p. 6, D. C. Cir. No. 21142 decided February 14, 1958.

16/ Reply Brief of appellant Blair, who joined in this claim of error in the main briefs, states his reply on factual aspects of appellee's argument on this point as it affects Blair.

on the probative value of the so-called "other cogent evidence." Without the eye-witness version of Officers Jacob and Schroeder of appellant's flight from the get-away car and appellant's virtually immediate arrest, there would be no reasonable basis for belief that appellant Suggs would have been found guilty beyond a reasonable doubt in the face of the alibi evidence presented by the defense. In appellee's own words (Br. p. 22) "Suggs was placed in the near proximity of the get-away car under highly probative circumstances right after the robbers were run to ground." Only the testimony of Officers Jacobs and Schroeder identified and linked appellant with the observed flight of robbers from the get-away car and with the recovered khaki bag with its incriminating evidence. Appellee's reliance on the LaNoir testimony even to the limited extent stated in its brief is not effective because contrary to the implication of appellee's argument Mrs. LaNoir never identified appellant as one of the two fleeing robbers. Tr. 1212-3. Indeed, she never identified appellant for any purpose. Such identification was essential if corroborative effect is to be given to her testimony as claimed by appellee. Otherwise, her testimony is equally consistent with appellant's version of the events in the alley preceding his arrest, i.e., two other persons took flight through the alley, both disappeared, as Mrs. LaNoir testitifed, and later appellant was apprehended and arrested. See appellant's Brief p. 48 fn 39

The key point, in any event, which appellee would not be expected to deny, would be that the testimony of arresting officers were major elements of proof in the government's case against appellants. As such it was reversible error for the trial court to have excluded all evidence of bias and hostility against these key prosecution witnesses and thereby insulated their testimony from any impeachment or attack on credibility on the grounds asserted.

Appellee's Argument III

The Byrd case cited by appellant (Br. p. 34) holds that it is plain error to fail to instruct the jury as to an essential element of the crime charged. The concept of taking "from the person or immediate actual possession of another" is the statutory language which is included to establish the requirement for robbery, i.e., that the larceny be from the person or that person's immediate actual possession. That language does not purport to define the nature of the taking and the asportation or carrying away that must exist as an element of the larceny involved in the robbery. The trial court's instructions (Tr. 1284-5) on this point merely repeated the statutory language and nowhere defined or explained either the taking or the asportation which are requisites to the larcenous element of the crime charged. Contrary to appellee's argument it was plain error for the trial court to omit instructions to the jury on asportation as an essential element of the larceny which must exist to support a

conviction for robbery. 2 WHARTON, CRIMINAL LAW p. 253 §552 (12th ed. 1957)

Appellee's Argument IV

Appellant agrees with appellee (Br. 21) that "money found on a defendant is admissible if there are evidentiary circumstances connecting the money to the robbery." Appellant disagrees with appellee's apparent view that such evidentiary circumstances were shown. Appellant argues that none was shown despite the apparent recovery by the police of all the bags, containers, etc. that the robbers were seen to have used or taken in their flight with the fruits of the robbery.[17] The cases cited by appellant recognize the need for laying some foundation for the admission in evidence of money found on the person charged with a robbery. These cases are further distinguishable in that no recovery of stolen money was made which would permit,as would be true of the case at bar, some evidentiary linking to the robbery of the defendant. The "sufficient evidentiary links" cited by appellee are not links that connected the money, found on appellant and admitted in evidence against him, with the stolen money that the police recovered. It was error, therefore, to admit the money in evidence solely on the basis of mere possession at the time of arrest. 1 WIGMORE, EVIDENCE

17/ See counterstatement, appellee's brief.

p. 601 §154 (3d Ed. 1940).

Regarding the bullet and the fingerprint appellant is entitled, appellee's argument to the contrary, to present to this court as error the government's failure, presumably with evidence available and wholly within its control, to explain or eliminate the reasonable doubt that must exist on these items of circumstantial evidence that the trial court allowed to go to the jury. Appellee in its brief does not address itself to the reasonable doubts and difficulties developed in appellant's brief (pp 50-59) to show the insufficiency as evidence of these two exhibits and the testimony relating thereto, i.e., the police recovery of a loaded pistol from which an extracted unfired bullet was later found on appellant's person of which he disclaimed any prior knowledge or possession and 2) appearance at the headquarters in the get-away car of an "intact" newspaper which no one had observed at the scene of arrest in the scouring for evidence and which was not observed by the only person (Blair) who admitted being in the get-away car before the arrest.

Appellee's Argument-V

Two points are made in this part of the appellee's brief and neither is well taken: (1) since the in-custody statement was on collateral matters and not a direct attack on the alibi itself, there was no error and (2) appellant's objections at trial were insufficient to put the trial court and the government on notice that Mallory and Miranda violations were involved.

As to the first, the transcript undercuts the appellee's point, since it is clear at Tr. 1233 that the prosecutor specifically developed in his examination of Officer Hannon that the in-custody statements of appellant were not consistent with appellant's alibi testimony at the trial.

As to the second point, appellant disagrees with appellee's contention that the objection of trial counsel was adequate to put the trial court and the prosecutor on notice of violations of appellant's rights. It is unnecessary, however, to argue the sufficiency or insufficiency of the objection because the opportunity for both the trial court and the prosecutor to be informed as to the violation of both the Mallory and Miranda rules was developed in the detailed examination of all events transpiring from appellant's arrest through his interrogation, which would amply inform both the trial court and the prosecutor that appellant had not been accorded his rights under the Mallory and Miranda decisions./ Appellant himself testified that he requested and was not afforded access to counsel. Tr. 553, 586-7. Such a record and defense counsel's specific objection (Tr. 1219-20) to the reception in evidence of the results of police interrogation provided for both trial court and prosecutor more than ample notice and opportunity to be apprised of the defectiveness of the in-custody statement. To require a more precise statement of objection by trial counsel in these circumstances would be an exercise of form but not of substance.

Tr. Vol. IV

Appellee's Argument-VI B (2) and C

As noted in appellant's main brief p. 59-60 and fn 46, his point of error 7 was shared by co-appellant Blair in companion case No. 21033. The point was briefed by that appellant in points I, II and III of his argument (appellant Blair's Brief pp 5-15) and was adopted by appellant Suggs. Appellant Suggs, likewise, adopts so much of the reply brief of appellant Blair as responds to appellee's argument VI. (appellee's Brief pp 24-27) The instant reply will be directed to matters concerning appellant Suggs as set forth in appellee's argument VI B (2) and C which are not fully met by reference to appellant Suggs' main brief pp 36-50 and 59-62.

Appellee's claim (Br. p. 28) of harmless error regarding appellant's argument (Br. p. 31) objecting to the trial court's and prosecutor's vigorous criticism of appellant's testimony, is not well taken if, as should be the case, the objection is taken not as an isolated matter but as part of a pattern in the trial.

Appellee's contention (Br. p. 28) that appellant's complaint at Tr. 217-218 does not survive reading is not well taken. Appellant (Br. p. 59) requested the court to read Tr. 216-221 to show the character of the colloquy between the trial court and defense counsel which includes the trial court's statement (Tr. 218-219) to appellant's trial counsel questioning her proper motive in the defense presented for appellant. It is reasonable to expect that such comment from the trial judge in the context of other noted episodes in the conduct of the

trial would unnerve and unsettle trial counsel and be clearly relevant to the contentions urged by appellant in this area of claimed error.

Appellee's reference (Br. p. 28) to appellant's complaint at Tr. 997-998 is mistaken since appellant's complaint (Br. 59)was at Tr. 987-988 and concerned the trial court's interference with defense counsel's redirect examination of one of appellant's alibi witness. See appellant's Brief p. 41, item 2.

Appellant's complaint at Tr. 1007-1008 is significant only in the context of the trial court's other actions in the conduct of the trial which appellant maintains were not conducive to a fair trial, i.e., refusal to allow defense counsel's request for circulation of Defendant Suggs Exhibit 9 police receipt given to appellant following search of his person listing property which included the $532 in money and excluded the .22 calibre bullet. See appellant's Brief pp 50-54.

In its contention that since appellant was given an opportunity to explain his answers and that no harm was done by the prosecutor's insistence on yes or no answers to multifactual questions, the appellee chooses to overlook what the transcript shows, i.e., that any such opportunity for explanation followed comment by the prosecutor with support and reinforcement at times from the bench indicating to the jury an evasiveness or lack of candor by the appellant when he was unable or unwilling to respond in the simple affirmative or negative manner demanded of him. Appellant was put in the position of having already lost credit in the eyes of the jury before he could get around to his explanation.

Relative to the impeachment of Charles Suggs, appellee urges (Br. p. 28) that the prosecutor's interrogation for impeachment purposes was based on the witness' unfamiliarity with the area and the street. The transcript citation (Tr. 933) makes reference only to the playground and area, and no reference to the street (Tr. 962-3). Appellee also makes the unsound contention that it was proper to impeach the witness before the jury by confronting him with purported self-contradictions made outside the presence of the jury which the jury had no way of evaluating beyond accepting the prosecutor's suggestion that the witness was unreliable because of self-contradictory testimony. Though appellee argues that appellant was properly impeached by the prosecutor for appellant's testimony on the length of his stay at No. 10 precinct, appellant submits that this was improper in view of the prosecutor's understanding to the contrary (confirmed by earlier examination) based on appellant's repeated prior testimony outside the presence of the jury. Appellant's Brief pp 40-41.

Regarding the appellant's wig sale activity, it is true that the examination and cross-examination of appellant in this are of evidence was developed before the jury, it was nonetheless unfair and prejudicial to appellant to have both prosecutor and judge subjecting appellant before the jury to accusatory commentary importing self-contradiction to appellant when any fair reading of the transcript

would show the contrary. Such methods of the prosecution were not conducive to a fair trial.

Appellee's concluding point (Br. 28-29) that appellant is precluded by lack of timely objection at trial from claiming error in the prosecutor's closing argument is a point which must be weighed in the light of the discussion by this court of a similar contention in a very recent decision.[18/] That case points out that lack of objection by trial counsel would not be fatal.

Respectfully submitted,

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18/ Garris v United States, p. 6, D. C. Cir. No. 21142 decided February 14, 1968.